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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida appears in the Record, pp. 76 to 81, and is reported in 28 Fed. Supp. 44.

JURISDICTION

The order or decree of the District Court granting the motion for interlocutory injunction was entered and filed April 28, 1939 (R. 75). The opinion of the District Court expressing the reasons for the granting of the interlocutory

injunction, and holding unconstitutional the State law involved, was dated April 13, 1939 and filed May 3, 1939 (R. 76 to 81). Petition for appeal was presented July 3, 1939 and filed July 7, 1939 (R. 86-87). The appeal was allowed on July 3, 1939 and the Order allowing same filed July 7, 1939 (R. 90-91). Probable jurisdiction was noted by this Court on October 9, 1939.

The jurisdiction of this Court is conferred by the Act of March 4, 1913 (c. 160, 37 Stat. 1013) as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938); Judicial Code, Section 266; Title 28, Section 380, U. S. Code. See also Rule 72 of the rules of civil procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Ch. 651.

Claims Advanced and Rulings Made in Lower Court

A. Contentions of Appellees in Lower Court

Appellees here, as plaintiffs in the District Court, contended that Chapter 16,862, Laws of Florida, Acts of 1935, known as the Growers' Cost Guarantee Act (set out in full herein in the appendix, pp. 118 to 120, was unconstitutional and void for the following reasons:

(1) Said Act was discriminatory as against plaintiffs because the Act did not apply to cooperative canning organizations or to growers who can their own grapefruit (R. 5).

(2) The Act was unreasonable, arbitrary and vague, and deprived plaintiffs of their property rights without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution (R. 14, 15, 16, 35).

(3) The Act imposed a burden on, and directly interfered with, interstate commerce in violation of Article I, Section 8 (3), of the Federal Constitution (R. 14).

(4) The Act impaired the obligation of plaintiffs' contracts in yiolation of Article I, Section 10, of the Federal Constitution (R. 16-17, also 35).

Appellees further contended in the lower court that the Regulation promulgated by the Florida Citrus Commission pursuant to said Act (which regulation is set out in full herein in the appendix, pp. 120 to 122) was unconstitutional and void for the following reasons:

1st. The Regulation was discriminatory in like manner as the Act (R. 5).

2nd. The Regulation was arbitrary, capricious, unreasonable, unfair, inequitable and confiscatory and constituted a denial of property rights of plaintiffs without due process of law (R. 13, 35).

3rd. The Regulation impaired the obligation of plaintiffs' contracts in violation of Article I, Section 10, of the Federal Constitution (R. 17-35).

Appellees further contended in the lower court that without regard to the constitutionality of the Act or Regulation, the Regulation was invalid and unenforceable for the following reasons:

(1) The Florida Citrus Commission did not have filed before it, at the time the Regulation was passed, petitions of 50% or more of owners of producing acreage of grapefruit in Florida (R. 11-12).

(2) The determination by the Florida Citrus Commission of the requisite percentage of owners of producing acreage of grapefruit in Florida was not based upon the proper surveys as specified in the Act (R. 12).

(3) When the Regulation was passed the Florida Citrus Commission had not procured from handlers of grape-

fruit, not subject to the Act, binding agreements to conform thereto (R. 12).

B. Rulings Made by Lower Court

The District Court in its opinion held the Act unconstitutional and void for the following reasons:

1. The Act violated the due process clause of the Fourteenth Amendment (R. 78-80).

2. The Act discriminated against plaintiffs and in favor of cooperative canning corporations (R. 80).

3. The Act was arbitrary and prejudicial (R. 80).

The District Court further held that, without regard to the constitutionality of the Act, the enforcement of the Regulation should be enjoined because:

1. There was no proof in the record that the Florida Citrus Commission had secured from handlers of grapefruit, not subject to the Act, their consent and agreement to conform to the Regulation.

Cases Sustaining Jurisdiction

The following cases are believed to sustain the jurisdiction of the Supreme Court: *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458; *Connolly* v. *Union Sewer Pipe*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; *Savage* v. *Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; *Polk Company* v. *Glover, etc.*, 305 U. S. 5, 59 S. Ct. 15, text 17, — L. Ed. —; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 55 S. Ct. 7; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. Rep. 578; *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 54 S. Ct. Rep. 505; *Milk Control Board of Penn-*

sylvania v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528; *Sligh* v. *Kirkwood*, 237 U. S. 52, 35 S. Ct. Rep. 501; *Townsend* v. *Yeomans*, 301 U. S. 441, 57 S. Ct. Rep. 842; *Barney* v. *City of New York*, 193 U. S. 430, 25 S. Ct. 502; *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135.

QUESTIONS PRESENTED

For convenience of the Court the questions presented on this appeal may be stated as follows:

1. May a statutory three-judge District Court, before the essential facts have been finally determined and before the issues have even been made up, proceed to declare unconstitutional a State regulatory Act, especially when the District Court in making such adjudication considers the testimony, largely ex parte, submitted at the hearing upon motion for interlocutory injunction?

2. Was the proper showing made by Appellees in the court below as to the amount involved in the controversy so as to invoke jurisdiction of the Federal Court to proceed to determine the merits of the case?

3. Do the Act and Regulation in their effect operate to directly interfere with, or to unduly burden, interstate commerce?

4. Is the Act discriminatory as against Appellees?

5. Are the Statute and Regulation so vague, arbitrary, unreasonable and confiscatory as to deprive appellees of their property without due process of law in contravention of the Fourteenth Amendment?

6. Should the enforcement of the Regulation be enjoined by a Federal District Court for supposed non-performance by the Commission of certain conditions precedent to the

issuance of the Regulation, especially where the Regulation on its face shows such performance and there is no proof to the contrary before the District Court?

7. Should the three-judge court have granted the interlocutory injunction?

STATUTES AND REGULATIONS INVOLVED

The State law involved in this cause is Chapter 16,862, Laws of Florida, Acts of 1935, adopted at the session of the legislature of the State of Florida of 1935, known as the Growers' Cost Guarantee Act, contained in Volume 1, General Laws of Florida, 1935, and is set out in full in the appendix, pp. 118 to 120. The Regulation of the Florida Citrus Commission, promulgated pursuant to said Act, also involved in this cause, is likewise set forth in full in the appendix, pp. 120 to 122.

Another State law incidently involved in this cause is Chapter 16,860, Laws of Florida, Acts of 1935, as amended by Chapter 17,777, Laws of Florida, Acts of 1937, known as the Bond & License law, contained in the Laws of Florida of those respective years, and is likewise set out at length in the appendix, pp. 122 to 131.

STATEMENT OF THE CASE

We will give the Court a brief resumé of the progress of the case in the court below, to be followed with an analysis of the Statutes and Regulation involved, the pleadings, the evidence, and the rulings made.

Complaint was filed by appellees here, as plaintiffs in the court below, on March 23, 1939, in the United States District Court for the Southern District of Florida, praying for injunction restraining Nathan Mayo, as Commissioner of Agriculture for the State of Florida, one of appellants

here and sole defendant in the court below, from enforcing or attempting to enforce the Growers' Cost Guarantee law and the Regulation of the Florida Citrus Commission promulgated on January 16, 1939, in pursuance of said Act. Injunction was also prayed restraining said Commissioner from revoking or suspending the licenses of plaintiffs as citrus fruit dealers under the Bond & License Act (R. 1-17-20, *et seq.*). Upon the filing of complaint the District Judge, on March 23, 1939, issued temporary restraining order in accordance with the prayer of the complaint, pending a hearing upon "motion for temporary injunction" (R. 32-33).

On March 28, 1939, upon proper petition, order was entered by the District Judge allowing the Florida Citrus Commission, a body corporate created under Act of the State legislature to intervene and be joined as a party defendant in the cause (R. 85-86).

A three-judge District Court was convened at Orlando, Florida, on April 10, 1939, composed of Judge Leon McCord of the Fifth Circuit Court of Appeals and Judge Robert T. Ervin, of the Southern District Court of Alabama and Judge Alexander Akerman, the resident District Judge where the suit was filed (R. 34-35). The three-judge court was convened "for the hearing and determination of the application for temporary injunction" (R. 35). Plaintiffs requested the right to introduce oral testimony and the court stated it would relax the rule to permit same (R. 45). The hearing was somewhat irregular, facts even being stated to the court by counsel for plaintiffs (R. 48, *et seq.*). Testimony was very brief. Two witnesses testified for plaintiffs. Six affidavits were submitted by defendants. The court observed that plaintiffs had not raised the question of "want of due process" (R. 69), whereupon plaintiffs, by permission of court and on the same day, filed an

amendment to the complaint (R. 35-36). The court thereupon gave plaintiffs five days from that date to file further affidavits and the defendants five days thereafter to file counter-affidavits (R. 69). Plaintiffs, on April 15, 1939, filed two affidavits (R. 71-74) and one certified copy of a resolution of the Florida Citrus Commission (R. 69-70).

On April 28, 1939, order was filed by the three-judge court granting the motion for interlocutory injunction and continuing in force the restraining order originally issued by the District Judge "until the final hearing in this case or until the further order of the Court" (R. 75-76). Said order recited that injunction was granted "after hearing the evidence and argument of counsel and for the reasons to be expressed in an opinion to be filed later" (R. 75). On May 3, 1939, the court filed its opinion (R. 76-81) which appears on its face to have been drawn up and signed on April 13, 1939 (R. 81). The opinion held the Growers' Cost Guarantee Act unconstitutional on several grounds, and in addition held that enforcement of the Regulation should be enjoined because of failure of the Commission to follow certain procedural requirements (R. 80).

At the time the order granting interlocutory injunction and the opinion of the court were filed, no pleadings had been filed on behalf of the Commissioner of Agriculture, or the Florida Citrus Commission, sole defendants in the case.[1] Thus the three-judge court struck down as unconstitutional a State Act and a Regulation promulgated thereunder before any issues were made up, before either of defendants had filed pleadings to the complaint, before there had been an orderly reception of evidence upon issues joined, before there had been any final determination of essential facts,

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[1] We may ignore the Florida Citrus Growers, Inc., which filed petition to intervene but never procured order allowing same (R. 74-75).

and even before all of the evidence had been adduced upon the motion for interlocutory injunction.[2]

It was not until May 17, 1939, that the defendants filed answer to the complaint, which answer incorporated three special defenses (R. 81) and a general defense consisting of a reply to the essential facts contained in the complaint (R. 82-85).

On July 7, 1939, the defendants procured order allowing appeal from the order and opinion of the three-judge court (R. 86-87, 90-91). The assignment of errors urged as error the several rulings made by the court on the merits of the case, the jurisdiction of the three-judge court to proceed at all, and the propriety of the procedure adopted by the court in pronouncing its judgment on the validity of the Act (R. 87-90).

With the foregoing as a synopsis of how the case proceeded in the lower court, we will analyze in more detail the Statutes and Regulation involved, the pleadings, evidence and rulings made, as follows:

The Statutes and Regulation Involved.

(*a*) *The Growers' Cost Guarantee Act* (R. 18-20). This Act contained a preamble setting forth certain findings of fact made by the legislature. The legislature found and declared that the production and distribution of citrus fruit was such a paramount industry in Florida that the prosperity of the State was dependent thereon in a large measure; that citrus fruit and juices were of great value to all classes of people and were prescribed by physicians; that it was necessary in the interest of the welfare and health of the

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[2] This is so because the Court wrote its opinion holding the Act unconstitutional on April 13, 1939 (R. 81), which was two days before plaintiffs filed additional affidavit evidence (R. 69-74) and seven days before defendants were to file counter-affidavits if desired (R. 69).

people that an adequate and dependable supply of citrus fruit be always available; that the production and handling of citrus fruit in Florida was a business affecting the public health and interest; that unfair and destructive trade practices had been and were being carried on in the sale and distribution of citrus fruit in Florida to such extent that fruit in many cases had been and was selling at prices below the cost of production, which fact seriously imperiled a dependable and adequate supply of the fruit; that the industry because of the foregoing facts was threatened with a break down; that the acute economic condition in Florida was in part due to the increasing disparity between the prices of citrus fruit and other commodities; that it was necessary to build up the quality and reputation of citrus fruit in the market and to stabilize the industry and to protect both the public and the growers against fraud and financial loss through further continuation of unscrupulous practices in the marketing of citrus fruits and to that end, to assure the grower of a return for his fruit at least equal to the cost of production; and that the Act was necessary for the purpose of protecting and promoting the public health and general welfare. The Act empowers the State Commissioner of Agriculture, by and with the consent and advice of the Governor, to declare the existence of a State Emergency in the Citrus Industry. Thereupon a petition signed by producers of at least 50% of the producing acreage of citrus fruit in Florida, requesting the fixing of the cost of production, is filed with the Florida Citrus Commission. The Commission also procures from producers or handlers of citrus fruit, not subject to the Act, agreements to conform to such Regulation. The Florida Citrus Commission is then directed to determine and record in permanent form annually the average reasonable cost per standard packed box of citrus fruit. After this is done, the Act declares that all agreements with the citrus grower under

which his fruit is bought, marketed or processed shall pay to the grower his cost of production as determined by the Commission. The Act declares unlawful any attempt by contract to preclude the grower from receiving such cost of production.

(*b*) *Regulation of the Florida Citrus Commission* (R. 31-32). This Regulation, unanimously adopted by the Florida Citrus Commission in open meeting on January 16, 1939, to become effective on January 20, 1939, recited that the State Commissioner of Agriculture, under authority of the Growers' Cost Guarantee law, and with the advice and consent of the Governor of Florida, had on January 13, 1939, declared the existence of a State emergency in the citrus industry. The Regulation recites compliance with certain conditions imposed upon the Commission in promulgating the Regulation.

The Regulation thereupon states that the Commission did find, determine and order that such cost of production for a standard packed box of grapefruit was 32¢ for the season 1938-39. The Regulation declared that all contracts with the grower of grapefruit shall be held to require payment to the grower of such cost of production.

(*c*) *The Bond and License Act* (R. 20). It will be unnecessary to analyze in detail the provisions of this Act. Suffice to refer only to those provisions pertinent to this case. The Act provides generally that all persons, firms, associations and corporations, dealing with growers of citrus fruit in the purchase, marketing and handling of fruit in Florida, must obtain from the State Commissioner of Agriculture a license as a citrus fruit dealer. Such license issues upon application therefor, the payment of a nominal fee, and the posting of a bond with the Commissioner in an amount commensurate with the business to be done by the dealer. The bond is not less than $500.00 nor more than $10,000.00.

The bond provides indemnity for the failure of such dealer to live up to his contracts with growers in the purchase of citrus fruit. Certain standards of business conduct and ethics on the part of the dealer with the grower are set forth in the Act and certain practices on the part of the dealer in his relation with the grower are declared unlawful. The Act then empowers the Commissioner, when he determines that any citrus fruit dealer has violated that Act or any other law of Florida applicable to citrus fruit dealers, to suspend or revoke the license of the dealer which action is reviewable by the Courts.

The Pleadings[3]

(a) *The Complaint*

Plaintiffs were listed as ten corporations and one partnership, all engaged in the business of canning citrus products produced and grown in Florida (R. 1-3). The only defendant named was Nathan Mayo, as Commissioner of Agriculture of Florida (R. 3). There was a general allegation that the cause involved a controversy in excess of $3,000.00 and arose under the Federal Constitution (R. 3). The history of the grapefruit canning industry was portrayed. The rapid progress of the industry was vividly set forth. It was alleged that the canning of grapefruit and grapefruit juice had developed into one of the principal industries of Florida, that the pack of canned grapefruit sections had increased from less than 900,000 cases in

[3] The complaint and amendment thereto on behalf of plaintiffs were the only pleadings filed in the cause at the time of the three-judge hearing and at the time of the order and opinion granting the interlocutory injunction and declaring the Act involved unconstitutional. The only pleading ever filed on behalf of defendants or either of them, was their joint and several answer filed on May 17, 1939 (R. 81), which was subsequent to the filing of the opinion and order aforesaid. The answer has been included in the record before this Court, but will not be gone into or considered in this brief because it was not before the three-judge court.

the season of 1931-32 to almost three and a half million cases in the season of 1937-38; that the pack of canned grapefruit juice had increased from about 230,000 cases in the season of 1931-32 to over three and one-third million cases in the season of 1937-38; and that the pack of canned combination juices (being a mixture of different citrus juices) had increased from about 80,000 cases in the season of 1935-36 to almost 600,000 cases in the season of 1937-38 (R. 3). It was alleged that during the five years next preceding the filing of the complaint the canning industry in Florida had utilized over twenty-four million boxes of grapefruit (R. 4). The flow of grapefruit into the canning field was graphically shown in the percentage of the annual grapefruit crop which during those five years had found its outlet in that field (R. 4). In the season of 1933-34 such percentage was a little over 21%; in the season of 1934-35 the percentage was 36½%; in the season of 1935-36 the percentage was 32%; in the season of 1936-37 the percentage was over 37%, and in the season of 1937-38 the percentage was almost 41½% (R. 4). It was alleged that the plaintiffs had packed, over the three year period preceding the filing of the complaint, over 60% of the total pack of processed grapefruit in Florida (R. 4). It was estimated that the pack for the then current season of 1938-39 would far exceed any previous annual pack in the history of the industry in Florida (R. 4). It was alleged that each of plaintiffs had been offered large volumes of grapefruit by growers in Florida at prices ranging from 12¢ to 25¢ per field box (R. 5). It was said that the plaintiffs and each of them, except for the operation of the Act and Regulation involved, could and would have bought said grapefruit and processed and sold the same "to the different distributors[4] at a profit far in excess of $3,000.00" (R. 5).

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[4] Just who the "different distributors" were is not stated.

It was alleged that many individual growers owned canning plants where they could can their own grapefruit without the burden of the Act, and that many other growers canned their grapefruit "through cooperative organizations to which the defendant contends the price law does not apply" (R. 5). It was alleged that "by reason of the foregoing facts" canned grapefruit was being offered for sale at prices which would not net the grower 32¢ per box (R. 5). The Act was thereupon alleged to be discriminatory because it "attempts to force these plaintiffs to pay a minimum price for their raw products while permitting others to operate in competition to these plaintiffs unrestrained by the provisions of said Law and Regulations" (R. 5). It was said that plaintiffs were threatened with loss of their property without due process of law, to the irreparable damage to each of over $3,000.00 (R. 5).

It was alleged that canned grapefruit sections and canned grapefruit juice processed in Florida was widely distributed in interstate commerce and that over 99% of such products of plaintiffs went through such channels (R. 5).

It was alleged that the canning season extended each year from about November 1st to the following June or July and that in preparing for the canning season it was necessary that cans and labels be ordered, labor secured, contracts made for the purchase of fruit, and factory operations planned generally (R. 6). It was also said to be the commercial practice for sales orders for the finished product to be secured in advance of the season (R. 6).

Competition from other areas was elaborately dwelt upon (R. 6-7). Competition between citrus juices and other fruit juices, such as tomato juice and pineapple juice, was also dwelt upon (R. 7). It was said that "any impediment upon the ready purchasing of grapefruit juice" would cause consumption to shift to other juices and thereby diminish

the flow of packed citrus juices into interstate commerce from Florida (R. 7). It was alleged that canned grapefruit juice from Texas was currently being offered at from 42¢ to 45¢ "per doz. f.o.b. Texas" and these plaintiffs would be unable to meet such competition (R. 7). Upon information and belief it was alleged that "the different companies canning in the State of Texas" were then buying grapefruit at from 12¢ to 20¢ per field box (R. 7). It was alleged that for several years the packed Florida product enjoyed a slightly higher price than the Texas canned product, but that if plaintiffs had to submit to the Act they could not compete with the Texas product "and the canning industry of Florida will suffer an irreparable loss and each of these plaintiffs will thereby suffer damages in excess of $3,000.00" (R. 7).

The total investments of plaintiffs in their plants and equipment was alleged as over $2,000,000, and over $100,000 for each plaintiff (R. 8). It was alleged that plaintiffs employed about 5000 people with a weekly pay-roll of about $100,000 (R. 8). It was alleged that Florida during the current season was faced with the largest grapefruit production in history, approximating 21,000,000 boxes, and that because of the Act and Regulation involved it had been impossible for plaintiffs to operate their factories and pay to the grower his cost of production as fixed by the Commission (R. 8). It was alleged that because of this latter fact there had been about 2,000,000 less cases packed so far during the current season than in the preceding season, which was causing the raw product to decay and rot "because the growers, who did not own a canning plant or belong to a cooperative were unable to sell their fruit" (R. 8). It was said that many growers were willing and anxious "to dispose" of their fruit to plaintiffs "at whatever price market conditions will warrant", but that plaintiffs were unable to buy the fruit because of the Act (R. 8).

It was alleged that it was necessary for plaintiffs to carry many employees during the non-operating period annually, and that if they were forced to close their plants because of the Act involved, each of them would suffer loss in excess of $3,000.00 "in overhead costs, salaries, etc." (R. 9).

It was said that, because of the Act and Regulation involved, plaintiffs were and would be unable to "take care of" their outside dealers and distributors who had over a period of years built up good will for various brands of canned products of plaintiffs and that damage in excess of $3,000.00 to each plaintiff would be suffered in loss of "good will and trade marks" (R. 9-10). It was said that such loss of good will could only be regained "at a tremendous cost and expense" to plaintiffs (R. 10). It was said that competition from other canned juices made it necessary that canned citrus products be kept continuously on the market (R. 10). It was alleged that in order to meet the cost of production fixed by the Commission, plaintiffs would have to receive "62¢ and 70¢ per doz. for grapefruit juice, whereas the Texas product was then being quoted at 42¢ per doz." (R. 10).

It was alleged that "some of the cooperative associations" were offering the canned product at a price which would not leave a sufficient margin to pay the grower 32¢ per box (R. 10-11). It was said that plaintiffs would not thereby be able to compete with the cooperative organizations and that plaintiffs would lose their "large investments" exceeding $3,000 to each plaintiff (R. 11).

It was alleged that the Florida Citrus Commission, when it promulgated the Regulation, did not have before it petitions signed by the requisite owners of producing acreage of citrus fruit in Florida (R. 11-12); that the Commission did not determine the percentage of acreage on the basis

of proper surveys (R. 12); and that the Commission did not procure from producers or handlers not subject to the Act proper agreements to conform to the Regulation (R. 12). Such deficiencies of procedure on the part of the Commission were said to render the Regulation null and void (R. 11-12). The Regulation was also attacked because the cost of production was determined by the Commission "as the result of experiments on certain isolated groves by certain persons who were not members of the Florida Citrus Commission" (R. 13). It was denied that 32¢ was the proper cost of production per standard packed box (R. 13). These considerations, it was alleged, rendered the Regulation arbitrary, unfair and confiscatory, and to amount to the taking of plaintiffs' property without due process of law (R. 13).

It was alleged that one of plaintiffs had theretofore filed a suit in the State Court in an attempt to uphold the validity of a contract evolved by that plaintiff, whereby the canner would act somewhat as agent for the grower in the canning of his grapefruit, but that the Supreme Court of Florida had held such contract to violate the Act (R. 13). It was said that plaintiffs had for two weeks been operating their plants under similar contracts, but that after the decision of the State Supreme Court aforesaid, the Commissioner of Agriculture had threatened to revoke their dealers' licenses if they continued operations under such contracts (R. 13-14).

It was alleged that because of the large percentage of the canned product moving in interstate commerce, the Act would violate the Interstate Commerce clause (R. 14). The Act was challenged as unreasonable, arbitrary and vague because the "true intent and purpose" of the Act could not be ascertained therefrom, because it could not be determined who was supposed to be embraced within the class filing petitions before the Commission for the fixing of the cost

of production,[5] because the Act failed to define those "not subject to the provisions" thereof from whom agreements to abide by the Regulation should be procured, because no penalties were provided in the Act for violations thereof, and because "it is impossible to tell who or what transactions are subject to the provisions thereof" (R. 14-15). It was said that out of State handlers, who could not possibly be known by the Commission, would certainly not be subject to the Act and for that reason the Act was void (R. 15).

It was alleged that the Commissioner of Agriculture contended he had the right, under the Bond and License Act, to revoke the licenses of plaintiffs as citrus fruit dealers if they did not comply with the Act and Regulation; but it was asserted that said Commissioner was "without authority whatsoever" to take such action of revocation (R. 15-16). It was alleged that if the Commissioner should revoke the licenses, the plaintiffs would be deprived of their property without due process of law (R. 16).

It was alleged that one of plaintiffs, Florida Grapefruit Canning Company, prior to the adoption of the Regulation by the Commission, had outstanding contracts with grapefruit growers in Florida for the furnishing of approximately 60,000 field boxes of grapefruit at a price less than 32¢ per box, and that such canner had contracts to sell the processed product at a price netting the canner more than $3,000.00 (R. 16). It was said that the Regulation had made it impossible for said canner to "accept said 60,000 boxes of grapefruit" at the previous price agreed upon and that said canner could not go through with its contract with the distributor if it had to meet the cost of production with

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[5] The Act provides that such petitions must be signed by persons, firms or corporations "owning or controlling" at least 50% of the producing acreage of citrus fruit. It was contended in the complaint that the use of the word "controlling" was so vague as to render the Act void (R. 14).

the grower (R. 16-17). This was alleged to impair the *obligation* of said canner's contracts in violation of the Federal Constitution.

Temporary restraining order against the Commissioner of Agriculture was prayed restraining said Commissioner from attempting to proceed against plaintiffs under the Bond and License Law and from otherwise attempting to enforce the Growers' Cost Guarantee Act and the Regulation of the Commission (R. 17). Interlocutory injunction by a three-judge court and subsequent permanent injunction were also prayed (R. 17).

(*b*) *Amendment to the complaint.*—After the evidence had been adduced and arguments made by counsel at the three-judge hearing on April 10, 1939, plaintiffs, at the suggestion of the court, filed amendment to the complaint instanter (R. 35, 69). The amendment set forth that "by reason of the facts and circumstances herein alleged" the Act and Regulation impaired the obligations of plaintiffs' contracts and denied their right to freedom of contract and abridged the "rights of personal liberty" of the plaintiffs and arbitrarily interfered with their private business and prohibited the "lawful occupations" of the plaintiffs and imposed unreasonable and unnecessary restrictions thereon (R. 35). It was alleged that because of such "facts" the Act and Regulation violated the Fourteenth Amendment to the Federal Constitution and Article I, Section 10, thereof.[6]

Evidence

Mr. C. E. Lindsey, head of the Lakeland Highlands Canning Company, testified (R. 50-63) that the current citrus crop was the largest ever grown in the nation; that Florida

[6] We have analyzed the complaint somewhat in detail to show how definitely shallow were the facts relied upon by plaintiffs as showing a factual situation making against the constitutionality of the law.

citrus had to compete with citrus grown in California, Arizona, Texas, and Porto Rico; that Texas was the largest competitor in volume; that the current season's crop in Texas was about 15 million boxes, and in Florida about 21½ million; that the current crop was as large as Texas had ever had; that during the current season up until the Regulation of the Commission went into effect, grapefruit was being purchased at approximately 25¢ a box for fruit intended to be processed into hearts or sections and 15¢ per box for fruit intended to be canned into juice; that in order to buy grapefruit at 32¢ per box he would have to sell the canned juice product at approximately 65¢ per case, and the canned section product at 85¢ per case; that canned grapefruit juice from Texas could be bought in extremely large quantities unsweetened at 42½ cents; that about 30% of the citrus canneries in Florida are owned by individual growers or cooperatives; that after the Regulation went into effect the cooperatives were selling canned grapefruit hearts at "75 cents a dozen", which could not have netted the owner 32¢ per box; that on January 1, 1939, his company had unfilled orders for between 100,000 and 200,000 cases which could not be filled without losing money in excess of $3,000, but that in every instance he had taken the matter of the Regulation up with his distributors and had been relieved from the terms of the contract; that since he had been operating under the protection of the temporary restraining order he had gotten back all his old customers except one or two; that canned grapefruit juice competes with canned tomato juice and canned pineapple juice, and grapefruit sections likewise competes with other canned fruits; that the volume of processing was normal in Florida up until the time the Regulation went into effect, but in the two months immediately following, processing had slowed down to the extent of a deficit of two million cases over the corresponding period two years before; that "any num-

ber" of growers were willing to sell their fruit at less than 32 cents per box; that he could purchase an unlimited amount of such fruit; that "in his opinion" he would not be able to operate his business the balance of the season without a loss under the Act and Regulation; that he did not know what the condition next year would be; that the overhead of his plant would be at least $500 a week "for sometime at least" even if shut down; that he had to "maintain" his employees the year round; that the plaintiffs employed around 5,000 or 6,000 people, with payroll of about $100,000 a week during the operating season; that over 99% of canned grapefruit in Florida goes into interstate commerce; that about 40% of the grapefruit grown per season in Florida goes into cans; that in Texas, grapefruit was being sold at from six to twelve cents a box in large quantities; that the sweetened Florida product enjoyed a higher price than the similar Texas product; that at 32 cents per box he could not compete with the Texas price; that the Florida canned product is disposed of through wholesale distributors, dealers and chain stores out of Florida, who in turn send it ultimately to the consumer; that a pack is sold under the label of either the packer or distributor; that certain brands have acquired good will on the market; that the canners will lose the distributors as customers if they are unable to supply the demand; that his plant, after first closing down when the Regulation was adopted, later reopened and operated for awhile under a form of contract whereby the canner presumed to act as agent for the grower in processing the fruit, but that he ceased such operation when the Supreme Court of Florida held invalid the contract. Mr. Lindsey admitted on cross-examination (R. 59-63) that there was an abundance of grapefruit in Florida during the current season; that he was not familiar with the cost of production of grapefruit in Texas, Arizona and California; that he did not know whether the growers

who owned canning plants maintained distinct corporate entities as owners of the grapefruit groves and as owners of the canneries; that he knew nothing about the legal setup of the cooperative associations in Florida; that he had always had to compete with other canned products in the market and would continue so to do; that canned grapefruit juice and hearts the current year were priced less than in preceding years; that in order to pay the grower 32 cents per box he would have to sell the canned product for around 65 cents, but he did not know how much the cooperative organizations were paying the grower; that he knew of no instance where the cooperatives processed fruit from any other than their own member growers; that in the operation of his plant he bought grapefruit as he needed it without making contracts in advance.

Mr. Fred Elder, head of the Florida Grapefruit Canners, Inc., testified (R. 63-67) he did business on what he called "futures", that is, made contracts for the sale of the processed product well in advance of the actual canning, the contract price being based upon what he estimated the fruit for that season would cost; that in pursuance of such operations he had prior to January 1, 1939, outstanding contracts for the sale of around 100,000 cases of canned grapefruit, and that he also had made contracts for the purchase of the raw product at from 15 cents to 20 cents "on the tree"; that but for the Regulation he could have bought what he had contracted for and made over $3,000; that after the Regulation went into effect he had tried to operate under a contract providing for the cash payment of 20 cents per box to the grower and the balance of 12 cents on the ensuing July 15th if the Act was still in operation and no litigation concerning the same was pending on that date; that his contract with S. & W. Co., on the Pacific Coast, a very large jobber, obligated him to furnish 100,000 cases of canned grapefruit and that after the Regulation became

effective the jobber voluntarily agreed to advance the contract price to prevent loss on the contract if the Act were upheld; that he had always maintained that canners could pay the growers 50 cents per box for their grapefruit and still make money, provided "it could be controlled". This was all the evidence on behalf of plaintiffs.

On behalf of defendants, Mr. John Maxcy, Chairman of the Florida Citrus Commission, made affidavit (R. 40-42) stating in detail the procedure followed by the Commission in ascertaining and determining the cost of production and in promulgating the Regulation, which showed that the Commission had followed all procedural requirements specified in the Act.

Submitted and filed were also affidavits by T. L. Hodson (R. 42-43), W. W. Hubbell (R. 43-44), R. H. Howard (R. 44-45) and Chas. F. Chastain (R. 36-37), all but one officials of the Florida Citrus Commission, each detailing the procedure followed by the Commission, step by step, in promulgating the Regulation and showing that the procedure had been regular and that the cost of production arrived at by the Commission was fair, just and reasonable.

J. F. Mays, head of the Bond and License division of the Department of Agriculture, made affidavit (R. 38-39) that his division was responsible for the enforcement of the Growers' Cost Guarantee law; that from the date the Regulation became operative, both the Act and the Regulation were enforced against the cooperative associations as well as independent canners, giving specific illustration of such enforcement; that the growers in Florida who own canning plants maintain separate legal entities in the ownership of the grove properties and in the ownership of the canning plants; that as against such grower owned plants the Act and Regulation were being enforced on the theory that each legal entity was a contracting party; that he knew of sev-

eral canning corporations in Florida that had operated during all or part of the time the Act was being enforced and had consistently paid the grower his cost of production as fixed by the Commission and still made a profit in their business; that the Commissioner of Agriculture had enforced the Act strictly, fairly, uniformly and impartially during all periods of operation, both as against independent canners, cooperative associations, grower-shippers and grower-canners.

The foregoing was all the evidence adduced at the three-judge hearing on April 10, 1939 (R. 45-69).

On April 15, 1939, two days after the opinion holding the Act unconstitutional was filed (R. 81), the plaintiffs, under leave of court previously given (R. 69), filed copy of Resolution of the Florida Citrus Commission adopted on March 21, 1939, together with two affidavits. The Resolution recited that "innumerable growers and shippers" had requested the Growers' Cost Guarantee Act be enforced strictly against all handlers of citrus fruits or be discarded; that there was complaint among the growers and shippers that the law was not being equitably enforced due to "different set-ups of the different handlers and the different schemes and devices used by canners and handlers generally to evade the law"; that certain auctions of grapefruit "indicated" that the grower was not receiving his cost of production; that it was "generally felt" that all the canners were not paying the cost of production to the grower; that this placed a hardship upon those operators abiding by the law; that the Florida Supreme Court had "clearly set forth the meaning of the law"; and that the Commission again wanted to back up the Commissioner of Agriculture in the enforcement of the Act to the full extent of its power and ability. Thereupon the Resolution made declaration of policy requesting the Commissioner of Agriculture to equitably enforce the law "100 per cent upon all handlers,

shippers and canners alike", and requested the Commissioner to state his opinion as to whether the law could be enforced equally against all such handlers.

John A. Snively, President of the Polk Packing Association, a cooperative association (R. 71-72), made affidavit that his association owned a grapefruit canning plant; that during the period the Act was in effect between January 19th and March 23rd of this year, his association canned for its grower members between 60,000 and 70,000 cases of grapefruit juice; that the association had endeavored to sell its products at a price that would repay the grower at least 32 cents per box but was unable so to do, and that the products were stored and held until the enforcement of the Act was restrained on March 23, 1939; that prior to that date other cooperative associations and grower-owned canning companies in Florida quoted a lower price for grapefruit juice than his association had quoted, and actually sold the same at the lower quotation; that at the current market price of grapefruit juice the canner could not pay the grower 32 cents per box without loss, unless the grower made up the deficit in the decreased profit in the canning operations.

Mr. Ralph Polk, Sr., President of The Polk Company, made affidavit (R. 72-74) that he did not know whether the Act was being enforced against cooperatives shipping fresh fruit, but that the auction prices indicated the grower could not receive 32 cents a box for his product; that it was impossible to determine whether any canning corporation in Florida had made any profits in their business during the current season, except that it was his "honest belief" that the current prices would not return to the growers 32 cents per box; that it was impossible to determine whether any canning corporations paying 32 cents per box to the grower for his grapefruit had made any profits until the close of

the season; that "many growers" had been satisfied with less than 32 cents per box for their product and that such "is all they expect to receive"; that he knew of cooperative canneries holding large volumes of canned grapefruit for which the grower has not been paid his cost of production and which stored products were in competition with the products of plaintiffs; that when the Regulation became operative, his association was forced to cease operation because of inability to pay the grower 32 cents per box; that prior to such time his association had been employing 1,250 persons with a weekly payroll of approximately $15,000; that his association was forced to buy canned grapefruit from other cooperatives and grower owned canning plants in order to meet their contract obligations, which canned product was so purchased at prices which would not return the grower 32 cents per box.

Rulings

The Order of the three-judge court, filed April 28, 1939 (R. 75-76), decreed that interlocutory injunction be granted and the previous restraining order of the District Judge be continued in effect "until the final hearing in this case or until the further order of the Court." It was stated the injunction was granted "for the reasons to be expressed in an opinion to be filed later".

The opinion (R. 76-81), filed May 3, 1939, but dated April 13, 1939, recited that the case had been argued and submitted on April 10th, 1939, "on the bill and testimony", that the defendants had appeared and, although not having filed answers, argued the case and requested the court to pass "on all questions presented, and especially on the constitutionality of the Act involved" (R. 76). The Act was held unconstitutional because it was arbitrary and prejudicial and violated the due process clause of the Fourteenth

Amendment and also because it was discriminatory against the canners and in favor of the cooperative corporations (R. 78-80). It was held that the Act did not protect the public nor was in the interest of the public, that it sought to help the grower at the expense of the canner, that under the Act and Regulation if the canners could not pay the cost of production the grower would lose his fruit entirely. It was further held that notwithstanding the question of constitutionality the enforcement of the Act should be enjoined because there was no proof in the record that the Florida Citrus Commission had proceeded properly in determining the cost of production and in promulgating the Regulation (R. 80).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellants specify the following assigned errors intended to be urged:

1. The action of the three-judge court in finding certain facts from the evidence adduced at the interlocutory hearing, which facts were considered in pronouncing judgment upon the validity of the Act, without waiting for the issues to be made up and the essential facts and constitutional questions finally determined in due course of procedure (Assignments 10 to 17 inclusive, R. 88-89).

2. The accuracy of certain findings of fact made by the court (Assignments 10 to 17 inclusive, R. 88-89).

3. The action of the three-judge court in adjudicating the merits of the case after plaintiffs had failed to show the requisite jurisdictional amount to be involved (Assignment 9, R. 88).

4. The ruling that the Act was discriminatory as against plaintiffs under the Federal Constitution (Assignment 7, R. 88).

5. The ruling that the Act was arbitrary and unreasonable under the Federal Constitution (Assignment 6, R. 88).

6. The ruling that the Act and Regulation violated the due process clause of the Fourteenth Amendment to the Federal Constitution (Assignments 4, 5, R. 87-88).

7. The ruling that the enforcement of the Regulation should be enjoined because there was no proof in the record that the Commission, before adopting the Regulation, had complied with certain procedural requirements (Assignment 17, R. 89).

8. The granting of interlocutory injunction (Assignment 1, R. 87).

SUMMARY OF ARGUMENT

I. The Procedural Question

The three-judge court was convened only for the purpose of hearing motion for interlocutory injunction. It was permissible for the District Court to hear and consider evidence upon such motion. The court should have required evidence to be in affidavit form and not permitted oral testimony before the three-judge court. Likewise, the court should have required plaintiffs to have all their evidence ready which they desired to adduce in support of their motion. Likewise, the court should not have gratuitously suggested to plaintiffs the filing of certain amendments to their complaint. But disregarding these departures as perhaps not vital, the court should not in any event have proceeded summarily to consider such motion evidence adduced at the hearing upon the question of the constitutionality of the Act and Regulation involved. The court should not have proceeded to pass judgment on the merits of the case and strike down the State law. The defendants had not even filed pleadings to the complaint. The evidence adduced by both sides was sketchy and anything but exhaustive. Plain-

tiffs produced only two witnesses at the hearing, neither of whom knew a great deal about the subject. Even if the court was determined to decide the constitutional question, it should at least not have used the testimony so offered at the hearing as the basis, either in whole or in part, for its judgment striking down the law. But the court did not wait until *all* the evidence was in on the motion for interlocutory injunction. The opinion was written and dated prior to the time plaintiffs had produced all their evidence and without waiting for such counter-affidavits as defendants might have filed under previous leave of court granted. Thus the court not only presumed to ground its judgment on the motion evidence, but upon only a part thereof. And the court also presumed to find facts from such part of the evidence. Lastly, the facts which the court so found were not sustained by the evidence adduced at the hearing proper or subsequent thereto. Summing up, the court should have restricted the hearing to what it was called for, namely, the granting or denying of an interlocutory injunction. Decision on the constitutional question should have been reserved until after a full hearing upon issues properly made up by the pleadings.

II. Jurisdictional Amount Not Involved

Appellants contend that plaintiffs in the court below did not meet their burden of alleging or proving the jurisdictional amount requisite to invoke the aid of the Federal District Court. The abstract averment is contained in the complaint that the cause involved a controversy in excess of $3,000. The complaint also went further and attempted to allege the particular items of damage. The bald allegation of the existence of the jurisdictional amount might be legally sufficient as a predicate in the complaint, but when the complaint goes further and attempts to particularize the several bases thereof, the sufficiency of the complaint in this

respect must be tested by such particular allegations. When so tested, such items of supposed damage relied on by plaintiffs fell short of the required standard.

But regardless of the sufficiency of the complaint on this point, the proof offered at the hearing clearly showed the *absence* of the jurisdictional amount. The items of damage asserted were speculative, vague and unascertainable in amount, if in fact the same existed or would ever exist. The jurisdictional amount is determined by the amount of damage shown affirmatively to accrue from the enforcement of the Act and the Regulation challenged. The value of the right sought to be protected against the enforcement of the alleged unconstitutional Act is the measure of the damages involved. Plaintiffs failed to sustain their jurisdictional burden either in the complaint or by testimony.

III. Burden Upon Interstate Commerce

The State may legislate even though the effect of the State law over interstate commerce is indirect. The distinction between "direct" and "indirect" burden upon interstate commerce is clearly defined by this Court. The mere fact that a State law may perchance create or impose a burden upon interstate commerce is not, in and of itself, sufficient to strike down the Act. Conflict with the Federal Constitution giving Congress the exclusive right to legislate upon matters within the field of interstate commerce is not brought about until the State law imposes a *direct* burden upon interstate commerce. But the instant Act imposes no burden, either direct or indirect. The regulation of the Act attaches to the article before it ever acquires the character of an interstate commerce shipment. It attaches before the interstate journey from Florida ever begins. In fact, the Act attaches before the processing of the fruit ever begins. The production of an article intended for interstate commerce is a matter of local regulation and until delivered to

the common carrier for transportation or the actual commencement of its transfer to another State the product remains intrastate. The interstate commerce clause does not in any way take from the State its inherent and fundamental right to exercise its police power in regulating or protecting an industry within its borders. The exercise of the police power has a clear field of operation before any question of interstate commerce ever arises. Furthermore, in any event, the State may legislate if Congress has failed to do so, even in fields that would otherwise be forbidden.

IV. Discrimination Against Independent Canners

The court in its opinion found that the cooperatives merely credited their grower members with 32¢ per box for the fruit furnished, which amount the grower would not receive back at the end of the season unless the market price enabled such payment. Although the Court concluded that such business methods of the cooperatives constituted discrimination in violation of the Fourteenth Amendment, it is submitted that such facts do not show discrimination at all, but merely present a *possibility* of discrimination in the event the market price will not permit the payment of 32¢ per box at the close of the season. Such amount may or may not be paid to the grower. The Court does not even hazard a guess, much less prophesy, that such amount would not be paid. Possible discrimination is not the same as actual discrimination. But even if the grower *does not* get his 32¢ per box from the cooperative to which he belongs, and even if the Act is in nowise enforced or attempted to be enforced against the cooperative (as alleged by the plaintiffs in their complaint, but not attempted to be proved), such facts would not constitute discrimination against the independent canners in violation of the Fourteenth Amendment. All independent canners are affected alike by the Act. Cooperatives are a different class than independent canners and may be

dealt with differently. This Court has so held. A regulatory Act or an administrative order may legally be enforced against independent dealers and by specific terms thereof not be enforced against cooperatives.

V. No Denial of Property Without Due Process of Law

The citrus industry in Florida was a major industry, so judicially noticed by this Court, as far back as 1915. It was, and is now, a business affected with a public interest. But the validity of price fixing Acts is not *necessarily* tested by whether the business regulated is affected with a public interest. Such Acts are unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. The Act here only operates in years of emergency. It only seeks to guarantee the grower his cost of producing the fruit, without additional margin. Freedom of contract is limited by the power of the legislature to pass regulatory measures, including price fixing, designed to protect, and eliminate evils within a major industry. The legislative findings of fact showed a condition existing in the Florida citrus industry which made necessary in years of emergency the guaranteeing to the grower of his cost of production in order that the grower might survive and the industry saved from extinction.

VI. Performance by Florida Citrus Commission of Condition Precedent in Passing Regulation

The Act provides that before the Commission adopts the the Regulation it shall procure from producers, shippers or handlers, not subject to the Act, binding agreements to conform thereto.

The Commission sufficiently complied with the Act by determining that all handlers of fruit grown in Florida were

subject to the Act. But the construction of such provision is a matter of local law. Under the Florida decisions the provision must be construed as directory rather than mandatory. Also, again adopting the local law, such provision is meaningless and may be entirely disregarded. But in any event, plaintiffs cannot object. They do not name any handlers not subject to the Act who have not signed agreements. They make no issue with the determination of the Commission. Lastly, the burden was upon those complaining to show that the Commission did not comply with the Act. In the absence of proof to the contrary, the Court must presume compliance, especially when the Regulation upon its face recites compliance. In the absence of outside proof either way, the Court is without authority to restrain the Regulation on such point.

VII. Interlocutory Injunction Should Not Have Been Granted

The sole reason expressed by the Court for granting the interlocutory injunction was that the Act was unconstitutional. If the Court was in error on the constitutional question the sole reason for entry of the order would fall, and the order should likewise fall. Also, irrespective of the reason assigned, the order should not have been entered because plaintiffs made no proper showing for an interlocutory injunction. The order was not entered until April 28, 1939, just a little over a month before the end of the canning season. Such delay was occasioned largely by failure of the plaintiffs to file their bill within a reasonable time after the Regulation became operative. Under all the circumstances of the case, and particularly in view of the delay occasioned, the canner would have suffered far less from denial of the injunction than the grower and the industry as a whole would have suffered from the granting

thereof. These facts should have impelled a denial of the application.

ARGUMENT

I. Procedure of the Three-Judge Court in Striking Down the Act and Regulation

The progress of the case in the court below is infected with so many procedural vices and departures from established and orderly practice that it makes difficult an argument on point of procedure under one head. The three-judge court was convened solely for the purpose of hearing the motion for interlocutory injunction (R. 34-35). The language of the order calling the court together limits the hearing specifically to "the hearing and determination of the application for temporary injunction" (R. 35). It may have been proper, in fact it is usually customary, for the parties at such hearing to adduce evidence in documentary form, and for the court to consider such evidence, *in the matter of determining whether or not the interlocutory injunction should be granted;* reserving always, until the final hearing in the case, a decision upon the grave constitutional questions. But here, at the very outset of the hearing, the court permitted counsel for plaintiffs to produce witnesses on the stand before the court and proceed to interrogate them orally, the same as in an ordinary damage suit in a law Court before a jury. To say the least, such procedure is unusual, undignified and cumbersome. Instances of the bizarre workings of this form of hearing were vividly presented when the court was called upon to rule upon objections of counsel during the progress of the interrogation (R. 64). The court was required, by the exigencies of the occasion, to adopt the huddle system in arriving at its rulings.

Also the matter of permitting plaintiffs more time to file affidavits, with an additional period thereafter to defendants

to file counter-affidavits. Counsel for plaintiffs presented not only a varied attack but also a resourceful one. When the factual situation for plaintiffs bogged down, upon the oral testimony, or seemed likely so to do, plaintiffs merely fell back upon the usual custom of filing affidavits and got additional time to do it (R. 68-69).

But while the foregoing anomalies of procedure may be dismissed as merely irregular but not fatal, the court proceeded from that point on to flagrantly disregard the most fundamental and elementary rules of procedure. At the time of the hearing neither of the defendants had filed pleadings. They had not even filed motion to dismiss the complaint.[7] Defendants did appear at the three-judge hearing in resistance of the motion for interlocutory injunction. The court later in its opinion recited that the defendants had requested the court to pass on the constitutionality of the Act (R. 76). It is not the province or disposition of counsel for Appellants here to take issue with this statement of the court. It is unnecessary to do so. In whatever manner such request may have been imparted to the court, or in what phraseology the same may have been couched, the fact is obvious that, even assuming such request was made, it could only extend to a determination of the validity of the Act *on its face*. Certain it is that such a request could not have encompassed a consideration, much less determination, of the *factual situation* as developed in the very loose, irregular, incomplete and hasty three-judge hearing.

But even if such a request *had* been all inclusive, and had embraced in so many words a request that the court proceed to make final determination of the facts, the court would have been powerless to do so. The court on the merits considers matters of evidence only in determination of issues

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[7] This was undoubtedly influenced by what this Court had previously said in *Polk Company* v. *Glover*, — U. S. —, 59 S. Ct. 15, see *infra*, p. 38.

of fact duly made up by the pleadings. Matters which are collateral or incidental to the main suit, such as applications for temporary injunction, receivership, etc., may be disposed of during the progress of the main case, and in the disposition of such incidental matters evidence, usually informal in nature, may be adduced. But *such* evidence has nothing to do with the main issues of the case. The merits must be determined in an orderly manner and only after issues have been made up by formal pleadings. In fact, that is the only purpose of testimony in the main suit, to enable the court to resolve the issues of fact created by adversary pleading.

So it is that the three-judge court was warranted in considering evidence adduced at the hearing *only upon the matter of issuing or denying the interlocutory injunction.* The constitutional questions would come on at a later date *after the pleadings had been filed and after testimony had been fully adduced and after final hearing and argument of counsel.* In fact, counsel for plaintiffs at the outset of the hearing practically conceded this in the following statement to the court (R. 47-48):

> "Mr. Reeves: Then I will point out to the court our position in this matter. It is our understanding that at this hearing it is *not necessary to go into all the merits of the case, to make a final determination,* but it is our duty to show that there is a substantial question involving jurisdiction (fol. 69) matter and credit, which we ask you to enjoin, and we shall receive irreparable damage unless the relief is granted that is prayed for. We feel that in this suit there are some novel questions involved, and that the court should go ahead *and protect us until final hearing, until we can get the testimony in and the issues made up.* As I understand it, no papers have been filed by the defendants or either of them."

And the court itself, in its order filed April 28, 1939, granting the interlocutory injunction, decreed that such injunction should continue "in full force and effect until the *final hearing* in this case or until the further order of the court" (R. 75-76). But when it came to writing the opinion containing the reasons for granting of the interlocutory injunction (R. 75), the court proceeded to determine the whole merits of the case. The court considered, commented upon, and apparently determined, the facts in the case from the meager evidence, mostly ex parte, which had been previously adduced at the interlocutory hearing and then proceeded to use those facts in striking down the State law as unconstitutional (R. 76-81).

It would have been bad enough if such procedure had been adopted to uphold an Act and dismiss a complaint challenging it (see *infra* p. 39). But here the streamline procedure was used to strike down the State law. It is difficult to understand just what issues would have been before the court subsequent to the filing of the opinion. The merits of the case had already been decided. The facts had already been determined. The State law had already been adjudicated unconstitutional. The well of emptiness would have been a seething cauldron compared to the justiciable matter remaining in the case after the opinion was filed. The order granting interlocutory injunction indicated the holding of a subsequent "final hearing in this case" (R. 76). But in view of the opinion, which was then already written (R. 81), there would be no rational or intelligent reason why such a future "final hearing" should be held nor what could be accomplished thereat. In point of effect the hearing on April 10th was a "final hearing", and the order of April 28th was a "final decree". The term "loose practice" is a sobriquet of meticulous procedure compared to the way this case was disposed of.

Another most unusual circumstance of procedure is that the court did not even wait *until all the evidence upon the interlocutory application was in* before writing its opinion denouncing the Act as unconstitutional. The opinion on its face (R. 81) shows that same was signed and dated on April 13, 1939, which was only three days after the three-judge hearing on April 10th. But the court, at request of plaintiffs, had on April 10th at the conclusion of the hearing, allowed five days within which plaintiffs could file additional affidavits (R. 68-69) and had granted defendants five days thereafter to file answering affidavits if desired. This would seem to automatically have operated to defer decision upon the motion for interlocutory injunction for at least ten days after April 10th, or until April 20th at the earliest. But on April 13th the Court spoke with swiftness, boldness and thoroughness. Not only was the application for interlocutory injunction disposed of but the whole case was decided. Plaintiffs in fact availed themselves of the opportunity to file additional affidavits and on April 15th filed in the case three pieces of additional documentary matter (R. 69-74). But as it subsequently developed, when the court released its opinion and filed the same in the cause, such subsequent documentary evidence of plaintiffs was unnecessary.

Appellants submit that the court below was in error in presuming to determine, or even consider, the facts as a basis for striking down the law. Such action by the court did flagrant violence to the rule laid down in *Polk Company* v. *Glover, etc.*, — U. S. —, 59 S. Ct. 15, text 17, — L. Ed. —, decided by this Court upon appeal from the same District Court, wherein it was stated:

> "The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194, 211-213, 55

S. Ct. 187, 192, 193, 79 L. Ed. 281, and cases cited. And that determination requires a *hearing in due course upon the issues raised by the pleadings.*"

In the *Polk* case, *supra*, a law of the State of Florida affecting the canning of citrus fruit was attacked in the District Court and at the time of the interlocutory three-judge hearing, the State enforcement officers, who were made defendants in the suit, had filed answers as well as motions to dismiss the bill. Voluminous evidence in the form of affidavits and exhibits was adduced by both sides at the hearing. The District Court denied the motion for interlocutory injunction, granted the motion to dismiss the bill, and made separate findings of fact and conclusions of law. The Supreme Court upon appeal, after observing that "the findings of the court indicate that *that evidence, in part at least,* underlay the final decree it entered", and that "for the purpose of that motion (to dismiss), the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction", held that plaintiffs were entitled "to an opportunity to prove their case, if they could, and *that the court should not have undertaken to dispose of the constitutional issues* • • • *in advance of that opportunity*". — U. S. text —, 59 S. Ct. text 17.

The rule announced in the *Polk* case is of equal force where the facts presented at the interlocutory hearing are used as the basis for holding a State statute *unconstitutional* as where the facts are used as the basis for holding the State law *constitutional.*

In *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, this Court discussed the necessity for important issues of fact to be tried out and determined in an orderly manner upon proper issues joined and after the fullest opportunity

to adduce testimony. The *Borden* case involved the validity of a State law of New York regulating the distribution and sale of milk. In the course of the opinion in that case (293 U. S. text 210), this Court stated:

> "* * * where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is *increasingly important* that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without *adequate factual support.*"

In remanding the *Borden's* case back to the District Court this Court directed the procedure to be thereafter pursued as follows:

> "* * * the motion for preliminary injunction should be heard and decided, and *the cause should proceed to final hearing upon pleadings and proofs;* the facts should be found and conclusions of law stated as required by Equity Rule 70½."

Mr. Justice Stone and Mr. Justice Cardozo filed supplementary memorandum in the *Borden* case, predicating their concurrence on the proposition that "there is a reasonable likelihood that the production of evidence will make the answer to the (constitutional) questions clearer" (55 S. Ct. text 193).

It is true that the opinion of the three-judge court in the instant case does not show clearly that the Court meant to make any specific findings of fact. What the Court

stated in its opinion was only that "the testimony showed" certain things to exist (R. 79-80). But whether or not these facts which the opinion states were "shown" by the testimony may be regarded as findings of fact under Rule 52, Rules of Civil Procedure (old Equity Rule 70½) or not, the conclusion is irrefutable that *such facts persuaded the Court in its adjudication on the State law.* The language of this Court in the *Polk* case that "the findings of the Court indicate that that evidence, in part at least, underlay the final decree it entered" is directly applicable.

And furthermore, it is submitted that the three-judge court was not warranted, from the evidence adduced at the interlocutory hearing, in finding or assuming the *particular facts* which it acted upon in striking down the statute. The facts which the Court mentioned in its opinion as having been "shown" by the testimony may be summarized as follows (R. 79-80): that the citrus industry as a whole is as dependent on the canners as it is on the growers; that fresh grapefruit cannot be stored for future sale, but the canned product can be; that in cases of a bumper crop the price of the fruit will be reduced and the consequent loss much greater than if such excess fruit is canned and the processed product stored for future sale; that the current year's crop in Florida was large; that the canner could not pay the cost price and process the product without suffering a loss; that the canners had large investments in their plants and employed thousands of people; that they had previous contracts for sale of canned grapefruit for future delivery which they were forced to cancel when the regulation became effective, the effect of which was to penalize the canners for the benefit of the growers; that the cooperative corporations did not pay cash for the fruit of their growers members, but credited the grower with the amount thereof and were not expected to pay the grower

such amount unless the market prices enabled the cooperatives to do so; that the Commissioner of Agriculture did not enforce the Act against the cooperatives but did enforce it against the independent canners, and that he must have construed the Act in accordance therewith; that if it cost a grower $10,000 to produce a crop and he could get $8,000 for it he would still not be able under the Act to sell his fruit and would thereby lose his entire crop; and that there was no "proof in the record" that the Florida Citrus Commission had obtained from producers and handlers, not subject to the act, agreements to conform to the Regulation, prior to the time it was promulgated (R. 79-80).

Let us see if the evidence submitted to the three-judge court, meager as it was, supported or authorized the foregoing assumptions of fact which the Court clearly used as the basis for its decision. The Court found that the industry depended as much upon the canners as upon the grower. This is a far-fetched assumption. The citrus canning industry is a comparatively young industry in Florida. It is true it has grown rapidly, but such growth has been over a comparatively short time. Plaintiffs in their complaint did not go further back than seven years prior to the filing of the complaint in showing the growth of the business (R. 3). The statistics alleged (although there was no testimony on the point) showed that the canning of grapefruit hearts had increased about 400% over the seven years; that the canning of grapefruit juice had increased about 1500% during the same time and that combination juices had only been canned during the three preceding seasons, which seasons showed an increase of over 700% from the first to the third season (R. 3). Also plaintiffs' own statistics in the complaint (although no testimony was adduced on the point) showed that during the seasons of 1933-34 the canners utilized only about one-fifth of the grapefruit crop and in the current season about 40% of

the crop (R. 4). No figures were shown prior to the 1933-34 seasons as to percentage. So that even looking at the matter from the standpoint of plaintiffs' allegations, and in the absence of evidence, the canners are far from being, even at this time, as important an outlet in the grapefruit field as the fresh fruit packer or as important to the grower as the fresh fruit packer. Canners in Florida are almost an infant industry compared with the fresh fruit packers and shippers. This Court had occasion in 1915, almost 25 years ago, to pass upon a Florida Statute prohibiting the shipment out of Florida of immature citrus fruit. Even at that early date this Court recognized and declared the citrus industry in Florida to be "a great home industry" and said further "we may take judicial notice of the fact that the raising of citrus fruit is one of the greatest industries of the State of Florida" (237 U. S. text 61). So that on the basis of abstract statistics the assumption of the Court that the canner and the grower were of *equal importance* in the citrus industry is not sustained.

But in analyzing the matter deeper than a consideration of mere figures or the age of the respective fields of the industry, there is even less basis for the assumption made by the Court. A grower is an *indispensable* part of the industry, the canner is not. The canner is merely one of the *several outlets* for what the grower produces. The grower was a part of the industry and was prospering long before any citrus product was ever packed into cans. *Without the grower, the industry could not survive.* There must be a raw product before there can be any processed product. The Act is for the benefit of, rather than the detriment to, the grower. By benefitting the grower and enabling him to survive, the entire industry is benefitted because it is saved from perishing. It is obvious that the producer could not continue if he did not receive for his product at least what it cost him to produce it. There is no more altruism

in the grower's business than in the canner's business. And even if the grower were possessed of an altruistic sentiment the plain economics of the business would soon force him out. The Act merely seeks to return to the grower, in years of emergency, a return for his product enabling him to break even. It does not allow for any margin of profit or any other charges except the actual cost of production.

So that when the Court assumes the fact that the canner is as important as the grower in the citrus industry, the Court is proceeding immediately upon a false premise which could not but fail to produce an erroneous conclusion upon the law. There was no testimony to support such fact. No such testimony *could* have been produced because it is not a fact. The allegations of plaintiffs' own complaint negatives such fact. And lastly, it is well within the realm of judicial knowledge that the industry is *far more dependent upon the grower than upon any other part of the industry, including the canner.* The legislature's own findings, stated in the preamble to the Act, which not even the complaint, much less the testimony, challenges, show that the assurance of a dependable supply by the grower is the purpose of the Act, which supply cannot be assured unless the grower can be guaranteed his cost of production in years of emergency (R. 18). The legislature found also that unwise trade practices had been and were being carried on in the sale of citrus fruit which in many cases caused the grower to receive less than what it cost him to produce his product, which fact was threatening the industry with a break-down (R. 18). These and other facts were found by the legislature and are not denied or contradicted by the canner-plaintiffs. Further argument is superfluous to demonstrate that the very first premise assumed by the three-Judge Court, that the industry is as much dependent upon

the canner as upon the grower, is so fallacious in fact and lacking in support by the record.

We will comment briefly upon other facts found or assumed by the Court. It is true that fresh grapefruit can not be stored for future sale and that the canned product can be stored (R. 79). It is also probably true that the market price of the product will be less in years of excess production than in other years (R. 79). But it does not necessarily follow, as found by the Court, that in such lean years the loss to the grower will be less if he can have his product canned and stored instead of shipped as fresh fruit. The canners would simply buy the product at the low prices and store it until such future time as prices of the processed product would be higher, thus and thereby reaping for himself a benefit from the lean season prices.

The fact, as found by the Court, that the canner could not pay the grower his cost of production without suffering a loss (R. 79) is disputable.[8] There were loose statements by plaintiffs' witnesses, largely in the nature of conclusions, which indicate that the canner *might* lose money. For instance, Mr. Lindsey testified (R. 52) that *if* he "met the Texas competition" he would either take a loss or could not operate. He stated what the processed product from Florida would have to bring to pay the grower his cost of production under the Act, but he did not say his processed product *would be unable to command that price* if the Act were in operation (R. 50-63). He was without knowledge of the respective cost of producing the fruit in Florida and in the other producing areas (R. 59). Mr. Elder (R. 66) stated that on January 1st of the current year he had outstanding contracts to deliver approximately 100,000 cases

[8] We are here dealing only with the *accuracy* of the Court's findings. The question of whether the conclusion of the Court on the validity of the law can be sustained, even assuming the facts as stated by the Court to exist, will be treated at other points in the brief.

of canned grapefruit, at prices which would not permit paying the grower 32 cents per box, but that after the Regulation went into effect his distributor had *voluntarily agreed to increase the contract price of the product in order to enable the payment to the grower of his 32 cents per box.* He admitted that under this modified arrangement he would not lose any money (R. 67). The subsequent affidavit of John A. Snively (R. 71-72) (filed after the opinion was written) merely stated that, *at the then market price of the processed product,* the canner could not pay the grower 32 cents per box (R. 71), and that if forced to do so *his association* would "have to take the loss *in operation*" (R. 72). Mr. Ralph Polk, Sr., stated (R. 73) that for a short period after the Regulation went into effect his company suspended operations because they were unable to pay the grower 32 cents per box "under the existing market conditions" (R. 73). But Mr. Polk's own assertion is neutralized by his further statement that *no canning plant could know whether it could pay the grower 32 cents per box for his product and make a profit or sustain a loss until the end of the season* (R. 73). In the face of the foregoing testimony, there is the evidence of Mr. J. F. Mays, filed at the three-Judge hearing, who testified, as head of the Bond and License division of the Department of Agriculture, that several canning corporations in Florida had operated during the time the Regulation was in effect and complied therewith and made a profit in their businesses (R. 38-39). So it is submitted that the Court was not warranted in assuming as a fact that the canners could not comply with the Act without sustaining a loss. In striking down the Act the Court should have been careful about the facts it assumed and should have acted only upon a clear and convincing showing by the testimony.

The large investments of the canners and the number of persons employed by them, as found by the Court (R. 80), is undoubtedly true. The existing contracts of the canners

for future delivery is true, but the finding of the Court that the canners were forced to cancel these contracts when the Regulation became effective (R. 80), is not borne out by the testimony. The most direct evidence on this point is by Mr. Elder, who testified his distributor had *voluntarily stepped up the contract price to enable the canner to pay the cost of production* (R. 66), which evidence certainly does not sustain the finding of the Court.

The Court was wholly unauthorized to conclude that the effect of the Regulation was to penalize the canners for the benefit of the growers (R. 80). The only benefit the grower received was to get back what it cost him to produce his fruit and the only effect it had upon the canner was to cause him to increase the price of his processed product, or cut down on his margin of profit, or decrease his operating cost.

The finding by the court that the cooperatives did not pay their growers in cash but merely gave them credits, which might or might not be paid at the end of the season (R. 80), was wholly unsupported by the testimony. Neither Mr. Lindsey nor Mr. Elder, who were the only witnesses for plaintiffs at the hearing testified as to the method of operation by the cooperatives. Neither of them were connected with the cooperatives. Mr. Lindsey did not even know under what law the cooperatives operated (R. 59-60). Mr. Lindsey did not know how much the cooperatives were paying the grower (R. 62). Mr. Elder was not even interrogated about the cooperatives (R. 63-67). Mr. John A. Snively filed affidavit two days after the opinion was written (R. 71), stating that his cooperative association, of which he was president, merely took the processed product which they were unable to dispose of at a profit, and *held the same in storage* while the Regulation was in effect (R. 71). Nowhere did he depose that the cooperatives *merely made book entries* in payment to the grower, such as found by the court. On the other hand, Mr. J. F. Mays positively

stated (R. 38) that the law was being strictly enforced as to all cooperatives. So the finding of the court on this point is not warranted. Likewise the finding of the court that the Commissioner of Agriculture did not construe the law as applicable to the cooperatives (R. 80) was not warranted upon the same evidentiary considerations just stated.

The court posed a purely hypothetical case of a grower producing a crop of fruit costing $10,000 and not being able to get anything for it under the enforcement of the Act and Regulation, although he could have gotten $8,000.00 for his crop if the Regulation were not in effect. It is needless to comment upon these facts because there was no evidence whatever in support thereof. The court merely assumed an abstract set of circumstances to sustain its theory of the *unwisdom* of the law. No growers were before the court complaining. Not even any packers or shippers were before the court. Only one isolated part of the industry, the canners, and only a few of those, were before the court. And the hypothetical case posed by the court hardly follows from the facts actually adduced. The evidence does not prove that if it cost the grower $10,000 to produce his crop he could not get that much for it. He might, for all the evidence proves, be able to sell it to the canners. As a matter of fact, even if all the canners were forced out of business, there is no showing in the record that the grower could not find outlets for all his fruit in the fresh fruit market. Also, if some of the canners had to slack down on their break-neck rate of processing, it might cause a decrease in the supply of the processed product and thereby raise the prices. The hypothetical set of facts assumed by the court was wholly unjustified, but perhaps betrays the real reason behind the court's decision to be *a dislike for the law.*

The last fact found by the court in its opinion is likewise without support in the evidence. The court found "no proof in the record" that the Florida Citrus Commission had obtained from those members of the industry not subject to the Act binding agreements to conform to the Regulation (R. 80). All the evidence before the court was directly to the contrary. The affidavit of Chas. F. Chastain (R. 36), the affidavit of John Maxcy (R. 40), the affidavit of T. L. Hodson (R. 42), the affidavit of W. W. Hubbell (R. 43), and the affidavit of R. H. Howard (R. 44), all but the latter of whom were officials of the Florida Citrus Commission, show a careful and painstaking adherence to all duties and conditions precedent imposed by the Act upon the Commission. The Regulation itself, as adopted unanimously by the Commission, shows on its face (R. 31) that the Commission took full cognizance of the provision of the Act referred to.

We have dwelt somewhat tediously upon the facts used by the court in its opinion as a basis for denouncing the Act and Regulation, for the reason that the facts stated in the court's opinion are very important. *These facts were used to knock out the State law.* The opinion shows it on its face. The court stated that the "effect" of certain facts was to deprive plaintiffs of their property without due process of law (R. 80). The court also stated that certain facts "certainly was discrimination against the canners" (R. 80). Other facts were stated to be "alone sufficient to make the Act arbitrary and prejudicial" (R. 80). That the facts stated by the court were relied upon to justify its opinion on the constitutional question is too obvious for further discussion.

It is respectfully submitted that the court was (1) not warranted in deciding the constitutionality of the law upon the motion for interlocutory injunction; (2) that it should

not have considered the facts introduced at such hearing as a basis for deciding the constitutional questions; (3) that if it did assume to consider such facts it should have waited at least until *all* the facts were in before making any findings upon which to base its decision; and (4) that the facts as so found by the court were not warranted or supported by the testimony.

II. The District Court Decided the Merits of the Case Without Jurisdictional Amount Being Shown

Plaintiffs alleged generally in their complaint that the cause involved a controversy in excess of $3,000, exclusive of interest and costs (R. 3). Other more specific allegations were alleged. Thus plaintiffs alleged that, except for the Act and Regulation involved, they could and would have bought grapefruit and processed the same at a profit of more than $3,000 to each plaintiff (R. 5). It was said that plaintiffs were threatened with loss of their property without due process of law to the damage to each of over $3,000 (R. 5). It was said the Florida canners could not compete with the Texas canners with the Act in force and that thereby each plaintiff would suffer a loss in excess of $3,000 (R. 7). It was said that if plaintiffs had to close down their plants they would be forced to maintain their overhead during the period of inactivity, in which event each of plaintiffs would suffer loss in excess of $3,000 (R. 9). It was said if plaintiffs could not market their processed product they would be damaged in loss of good will and trade mark in excess of $3,000 each (R. 9-10). It was said that plaintiffs would not be able to compete with the cooperatives and that this would cause a loss of over $3,000 to each plaintiff (R. 11). It was said that one of plaintiffs, Florida Grapefruit Canning Company, had outstanding

contracts with its distributors for delivery of a large quantity of the processed product at a contract price which would have given the canners a profit of over $3,000, but which profit could not be realized if the Act and Regulation were in effect (R. 16).

The foregoing are all the allegations, general and special, in the complaint, with reference to jurisdictional amount involved. Most of the allegations are in general terms and add nothing to the general allegations contained in Paragraph III of the complaint (R. 3). But the evidence offered at the three-judge hearing wholly failed to prove or support the meager allegations of the bill in this respect. Mr. Lindsey, manager of one of the plaintiff corporations, testified that he had orders for "somewhere between 100,000 and 200,000 cases" of canned grapefruit at a contract price which would have caused this company to suffer a loss in excess of $3,000 if required to pay the grower 32¢ a box for the raw product (R. 63). But Mr. Lindsey was then asked "What happened—did you get out of those orders?" (R. 53) and he replied that the distributors had, upon request of his company, relieved the company of its obligation under the contract (R. 53). He stated that since the temporary restraining order had been in force his company had gained back as customers all but one or two of the distributors. These facts failed to prove jurisdictional amount. Mr. Lindsey's company did not lose anything. He did not say, nor was he asked, what profit, if any, his company *would have made* if allowed to go through with the contract without the operation of the law. For all his evidence showed his company would have made *no profit at all.* In the one event, the company would have been merely swapping dollars, and in the other event the deal was simply off. Further attempt was made, during the testimony of Mr. Lindsey, to show jurisdictional amount. He testi-

fied (R. 55) that it would cost his plant at least $500 a week "for some time at least" as overhead charges even if not operating. But Mr. Lindsey did not testify in this connection that his plant would have to close down. He merely said that in his "opinion" he could not operate and pay the grower 32¢ per box "without losing money" (R. 55). Whether his opinion was accurate or not, whether it was based upon any more facts than he stated, or how much money would be lost, are facts which, from the evidence, are within the realm of speculation. In fact, he only "imagined" that the loss, if forced to close down, would be $500 a week in overhead (R. 55). This testimony does not measure up to the required standard of proof of jurisdictional amount. Mr. Fred Elder, the other witness for plaintiffs, testified that except for the operation of the Act his company could have made over $3,000 on outstanding contracts for delivery of the canned product (R. 64). But Mr. Elder admitted that on this contract, providing for the delivery to a Pacific Coast distributor of 100,000 cases, the distributor voluntarily advanced the contract price in order to enable the company to pay the grower 32¢ per box after the Regulation went into effect (R. 66). Mr. Elder also admitted that his company had submitted to the Commissioner of Agriculture a proposed contract with the grower whereby his company would pay the grower 20¢ per box cash and the balance of 12¢ per box on the ensuing July 15th providing the Act was upheld and no litigation then pending (R. 65). This in itself shows a willingness to do business under the Act. Mr. Elder admitted that although he made his contract with the distributors in advance of the season, he utilized the fruit from the growers from day to day (R. 64) which fact automatically caused a fluctuation in his margin of profit or loss, whether the Act was in operation or not, depending upon the current market price.

The foregoing is all the evidence adduced by plaintiffs in support of the allegation of jurisdictional amount. Neither of the subsequent affidavits produced by plaintiffs on April 15th (R. 71-75) mention the jurisdictional amount. It is submitted that such proof is insufficient to confer jurisdiction upon the District Court.

In the case of *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 80 L. Ed. 1135, suit was brought by General Motors Acceptance Corporation of Indiana to enjoin the enforcement officials of that State from enforcing a certain Indiana Act of 1935. The Act prescribed regulation of the business of purchasing contracts arising out of retail installment sales. The validity of the Act was challenged because of asserted conflict with the due process and equal protection clauses of the Federal Constitution. Interlocutory injunction was sought and upon hearing before a three-judge District Court final decree was entered granting permanent injunction. No opinion was rendered. The District Court made no specific findings of fact upon the amount in controversy other than the *implied* finding of existence thereof by the granting of the injunction.[9] Apparently, from the opinion of this Court, the point was not at first raised nor argued upon the appeal. However, upon the argument in this Court leave was given the General Motors Corporation to file brief upon the point of jurisdictional amount. The case was later disposed of by this Court solely upon that point. The opinion recited the averments of the bill filed in the lower court with respect to the alleged items of damage. Such items as alleged followed in principle the same items alleged in the bill of complaint filed in the instant case. These concerned the value and worth of plaintiff's business, the value of their equipment, the value of their contracts, loss of profits from enforce-

[9] The same situation exists here.

ment of the Act, etc. (Id. 298 U. S. text 180). The opinion then states (Id. 298 U. S. text 181):

> "Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 27 S. Ct. 529, 51 L. Ed. 821; Bitterman *v.* Louisville & Nashville R. Co., 207 U. S. 205, 28 S. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Berryman *v.* Board of Trustees of Whitman College, 222 U. S. 334, 32 S. Ct. 147, 56 L. Ed. 225; Glenwood Light Co. *v.* Mutual Light Co., 239 U. S. 121, 36 S. Ct. 30, 60 L. Ed. 174; Healy *v.* Ratta, 292 U. S. 263, 54 S. Ct. 700, 78 L. Ed. 1248. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

This Court observed in the *General Motors* case that the general averment was made in the bill that the matter in controversy exceeded the sum of $3,000, exclusive of interest and costs, and that such allegation was denied by the an-

swer. The General Motors Company argued that the burden of proof lay upon the defendant enforcement officers in such case and not upon those challenging the act assailed. This Court determined that question adversely to the General Motors Company and held as follows (Id. 298 U. S. text 188):

"We think that the terms and implications of the Federal act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District

Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

This Court held in the *General Motors* case that the issue was one of fact and that it was the *duty* of the District Court, at any stage of the proceedings, to inquire into the existence of such facts and to see that such proof was presented, *even where no formal issue was made up.*

The case of *McNutt, Governor* v. *McHenry Chevrolet Co., Inc.*, 298 U. S. 190, 80 L. Ed. 1141, was argued before this Court and decided on the same date as the *General Motors* case. The *McHenry* suit was brought before a three-judge Federal Court, challenging the same Act involved in the *General Motors* case. In the *McHenry* case the plaintiff was a dealer selling automobiles at retail for cash or on the installment plan. The District Court granted permanent injunction and the appeal therefrom was decided by this Court upon the same proposition stated in disposing of the *General Motors* case. Different allegations of damage were relied upon in the *McHenry* case, which allegations were reviewed by this Court in the opinion (Id. 298 U. S. text 191-192). The *McHenry Company* averred the net worth of its business to be in excess of $3,000; that it had on hand automobiles of the combined value of $16,000; that its retail prices from the sale of cars during five months expiring May 31, 1935 amounted to about $164,000; that most of its sales consisted of installment transactions; that based upon orders and other data, it expected to sell a large number of cars in June and July of 1935 and during the remainder of that year, and that the conduct of its business would be rendered uncertain "by reason of the risk involved in making future commitments for the purchase of automobiles and the inability to obtain future commitments for the resale of such automobiles and for those on hand, and for the sale of

retail installment contracts covering the automobiles on hand, as well as cars which might be ordered, to the General Motors Acceptance Corporation or any other finance company" (Id. 298 U. S. text 191-192). This Court observed that while the District Court made findings with respect to the character and extent of McHenry's business, "the record contains no finding or evidence showing the amount of the loss, if any, which would be caused by the regulations assailed" (Id. 298 U. S. text 192). The case was reversed upon authority of the *General Motors* case.

In the case of *KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183, the point was again considered. KVOS was a radio station at Bellingham, Wash., and suit was brought by the Associated Press to enjoin the radio station proprietor from appropriating, using or disseminating news gathered by the radio station during the period that such news had commercial value to the Associated Press and its members; in other words, to keep such news for the exclusive use of the newspaper so long as such news had any value as such. Temporary restraining order was issued by the District Court and an order was entered directing the radio station to show cause why an injunction should not be granted. Prior to the hearing upon injunction, the radio station filed motion to dismiss, raising among other things the absence of jurisdictional amount. Adversary affidavits were presented at the hearing, upon motion for preliminary injunction and upon motion to dismiss. The District Court found that the business and conduct of the parties was substantially as alleged in the bill, and that "the amount in controversy herein, by reason of defendant's motion, must be construed to be in excess of $3,000, exclusive of interest and costs", but found that the radio station had not interfered with the normal operation of the Associated Press's business or diverted any of its profits. The District Court held that it had jurisdiction of

the parties and the subject matter because the motion to dismiss "admitted" the existence of jurisdictional amount, but dismissed the suit and refused preliminary injunction because it found that the acts of the radio station did not amount to unfair competition nor violate property rights. The Court of Appeals held the jurisdictional amount to be amply shown, and that the radio station was in competition with the Associated Press and its constituent newspaper members and directed issuance of preliminary injunction. Upon certiorari, this Court observed that "Although the decision with respect to the amount in controversy was assigned as error in this Court, the parties have in the main directed their arguments to the merits . . . . We have no occasion to consider the soundness of these conflicting contentions, for we hold that in the circumstances the respondent had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it" (Id. 299 U. S. text 277).

The importance of the holding in the *KVOS* case is seen from the fact that this Court refused to be guided by the supposed precedent of the case of *International News Service* v. *Associated Press*, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, in which case this Court considered the merits although the allegations of the bill involved therein were substantially the same as those of the bill in the *KVOS* case.

Again in the further case of *Kroger Grocery & Baking Co.* v. *Lutz, Attorney General*, 299 U. S. 300, 81 L. Ed. 251, this Court passed upon the question. In the *Kroger* case plaintiff brought a suit to restrain enforcement of an order of the Milk Control Board of Indiana fixing the price of milk sold in a certain area. Upon hearing before a three-Judge District Court upon motion for preliminary injunction, the suit was dismissed for want of jurisdiction upon

the ground that the requisite jurisdictional amount was not involved. The District Court found, as quoted by this Court in its opinion (Id. 299 U. S. text 300-301), that the plaintiff owned and operated a grocery store chain in and out of the State of Indiana, a number of which were located within the area fixed in the order of the Milk Control Board involved therein; that the investment in such stores approximated $450,000, having annual sales approximating two million dollars, of which amount the sum of approximately $45,000 was received from sales of milk and dairy products. It was further found that said stores sold less than 550,000 quarts of milk per year, the profit upon which was .00398 per quart. It was computed that the total loss of plaintiff in profits for a one-year period if it completely lost its milk business would be $2089.00 on the basis of 550,000 quarts. This Court held as follows (Id. 299 U. S. text 301-302):

> "In determing whether the requisite jurisdictional amount is in controversy, where it does not appear that the complainant is deprived of its license or is prevented by the regulation from prosecuting its business, the question is not the value or net worth of the business, but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed. McNutt *v.* General Motors Acceptance Corporation, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135.
>
> In order to support its contention, complainant seeks to capitalize its earnings and thus to arrive at the value of the part of the business affected by the order. But that basis of ascertaining a capital loss is not available to complainant here, as the statute, and with it the order, expire by limitation on July 1, 1937. The hurt by reason of the regulation does not appear to be greater than the loss sustained while the statute is in operation. The decree of the District Court is affirmed."

In the case of *Healy* v. *Ratta*, 292 U. S. 263, 54 S. Ct. 700, this Court had under consideration an Act of the State of New Hampshire which required the payment of an annual license tax for a peddler or hawker. The Act was challenged as an infringement of the Fourteenth Amendment. Suit was brought in the New Hampshire Federal District Court. The sale and distribution of vacuum cleaners in the State of New Hampshire by Ratta, a traveling salesman, without payment of the peddler's tax, gave rise to the suit. It was alleged by Ratta that the value of his business and his loss on account of the infringement of the Act, would each be more than $3,000. The District Court concluded that the requisite jurisdictional amount had been shown. After the decree of the District Court for plaintiff had been affirmed by the First Circuit Court of Appeals, this Court reversed on the ground that jurisdictional amount was not present. We quote from a portion of the opinion which may be pertinent and applicable to the instant case (292 U. S. text 268, 54 S. Ct. text 702):

> "It has been said that it is the value of the 'object of the suit' which determines the jurisdictional amount in the federal courts, (cases cited). But this does not mean objects which are merely collateral or incidental to the determination of the issue raised by the pleadings. The statute itself does not speak of objects of the suit. It confers jurisdiction only if 'the matter in controversy exceeds * * * the sum or value of $3,000. * * *
>
> Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business or the injury to it is the matter in controversy. (Cases cited.) But the possible suppression of the business here, through the prosecution of those who conduct it, is but the threatened consequence or penalty for nonpayment of the challenged act. It is true that, where there is no method at law to test the legality of a tax

without risk of incurring a penalty, the imminence of the penalty may involve such a threat of irreparable injury as to satisfy the requirements of equity jurisdiction. (Cases cited.) But the inability of a taxpayer to litigate the validity of a tax without risk of irreparable injury to his business, which is ground for invoking the equity powers of a federal court, affords no measure of the value of the matter in controversy.

* * *

Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it. Compare Davis *v.* Mills (C. C.) 99 F. 39, 40. From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. *The policy of the statute calls for its strict construction.* The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (article 3) (cases cited). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they *scrupulously confine their own jurisdiction to the precise limits which the statute has defined.* (Cases cited.) (Italics ours.)

In the case of *Henneford et al.* v. *Northern Pac. Ry. Co.*, 303 U. S. 17, 58 S. Ct. 415, this Court considered an Act of the State of Washington, which levied a 2% tax for the

privilege of using within the State certain tangible personal property. Suit was brought by the railroad company in the Federal District Court to restrain the enforcement of the State law. A three-Judge District Court enjoined the enforcement of the tax. Upon appeal this Court reversed because of the failure of the record to show requisite jurisdictional amount. The amount of the tax sought to be enjoined was $2,044.08, but the Railroad Company had alleged that upon failure to pay the tax the enforcement authorities would cease and sell the company's property to the irreparable damage to the company of more than $100,000. This Court held that, although, lacking an adequate remedy at law in the Federal Court, the Federal Equity Court was available, the jurisdictional amount of $3,000 was not present. It was held that damages which *might* accrue upon the failure to pay the required tax could not be computed as damages under the Federal Statute.

Although the facts were not exactly parallel, an application of the *rationale* of the above cases demonstrates that the case at bar was not maintainable in the District Court. As stated in the *Kroger* opinion, "The question is not the value or net worth of the business, but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed" (*Id.* 299 U. S. text 301). And as stated in the *radio station* case, where the bill goes further than the formal allegation of jurisdictional amount and presumes to set forth *particular* averments of damage "in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint," the suit should be dismissed by the Court *sua sponte* or upon motion of defendant (*Id.* 299 U. S. 277).

It is true that, in view of the foregoing authorities, the complaint alleging in general terms the existence of the

requisite jurisdictional amount might have been sustained as a pleading. But when the court went beyond the granting of an interlocutory injunction and proceeded to, in effect, determine the full merits of the case by holding the State law unconstitutional, the existence of jurisdictional amount should have been previously established as a condition, prerequisite. It is unnecessary to consider whether the court could have, in the absence of pleadings by defendants raising the point, have proceeded to issue an interlocutory injunction without passing on the merits of the case. Here the court proceeded at once to a consideration of the constitutional questions and struck down the State law. The court was without jurisdiction to do this unless plaintiffs first established jurisdictional amount.

The testimony on behalf of plaintiffs did not show measurable damage in excess of $3,000. Such damage as was sought to be proved was merely speculative and consisted of opinions and apprehensions.

It is submitted that upon the point of jurisdictional amount the judgment or order appealed from should be reversed with directions to dismiss the case.

III. The Act and Regulation do not Impose a Burden upon Interstate Commerce

It was alleged in the Complaint that over 99% of the processed products of plaintiffs went into interstate commerce (R. 5). It was alleged that the enforcement of the Act might "diminish the flow" of the packed product into interstate commerce from Florida (R. 7). At the hearing evidence was adduced by plaintiffs to sustain the heavy volume of interstate commerce in the packed product (R. 56). Upon the basis of the foregoing facts the contention was made that the Act violated the interstate commerce clause of the Federal Constitution (R. 14).

Appellants contend that the enforcement of the Act does not impede or obstruct interstate commerce or impose any direct burden thereon. The Act and Regulation operates before the processed product ever begins its journey out of the State and *even before the product is ever canned.* The Act operates when the canner buys the raw grapefruit from the grower. *When the product begins its interstate journey it is not even in the same condition as it is when the challenged act attaches.* The police power of the State is therefore exerted *before* the product ever acquires the charactr of interstate commerce.

In *Carter* v. *Carter Coal Company,* 298 U. S. 238, 56 S. Ct. 855, the Supreme Court passed upon a Federal regulatory Act which depended for constitutional validity upon the theory that Congress could regulate where the effect upon interstate commerce was *either direct or indirect.* The Supreme Court drew a sharp distinction between the two terms, holding that Federal regulation was permitted only where the effect upon interstate commerce is *direct,* and that when such effect is merely indirect (*i. e.* incidental), the Federal government has no jurisdiction. The 18th headnote of the *Carter* case defines the distinction:

> "The word 'direct' implies that the activity or condition invoked or blamed shall *operate proximately and not mediately, remotely, or collaterally to produce the effect.* It connotes the absence of an efficient intervening agency or condition. And the *extent of the effect bears no logical relation to its character.* The distinction between a 'direct' and an 'indirect' effect turns, not on the magnitude of either the cause or the effect, but *entirely on the manner in which the effect has been brought about.*"

Referring to certain attempts of the Congress to enlarge the scope of Federal regulation, the court in the *Carter* case observed that—

"If the commerce clause could be construed to reach transactions having an *indirect* effect upon interstate commerce, the Federal authority would embrace practically *all the activities of the people*, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government." (*Id.* 298 U. S. text 309, 56 S. Ct. text 872.)

And that

"* * * on such a theory, even the development of the state's commercial facilities would be subject to Federal control."

The *Schechter* case (text 295 U. S. 546, 55 S. Ct. 850) was a forerunner of the *Carter Coal Company* case and laid down the principle that Federal power is limited to such transactions as *directly* effect commerce between the States and that where such affect is merely *indirect*, such transactions remain within the domain of the State's power.

The principle laid down and applied in the *Carter* and *Schechter* cases is still the law. The Supreme Court has not receded from those views formerly expressed, either in the *Jones and Laughlin* case or any other case. A close reading of the *Jones and Laughlin* case, 301 U. S. 1, 57 S. Ct. 615, will demonstrate that the principle announced in the *Schechter* and *Carter* cases was preserved and redeclared and merely applied to the fact of that case. The fact that when so applied, the Wagner Act, which was involved in the *Jones and Laughlin* case, was upheld as constitutional, whereas the National Industrial Recovery Act and the Bituminous Coal Conservation Act involved in the *Schechter* and *Carter* cases were stricken down, in no way detracts from the point in issue. The difference between the *Jones and Laughlin* case and the earlier cases rests in the facts shown to exist in the different businesses and industries involved in the several cases, and not in the principle of law

which divides the scope of National and State power under the Commerce clause. That yardstick remains the same. We have but to consider certain pertinent extracts of Mister Chief Justice Hughes' opinion in the *Jones and Laughlin* case to see that this is true. We quote (301 U. S. text 30, 57 S. Ct. text 621):

> "The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of the State. That distinction between what is national and what is local in the activities of commerce, is vital to the maintenance of a Federal system. * * * It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. * * * Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

The principle involved is not new, but is merely the restatement of established doctrines in the construction of the constitutional provision by the Supreme Court itself.

In *Hall* v. *Geiger-Jones Company*, 242 U. S. 539, 61 L. Ed. 481, the Supreme Court considered the constitutionality of the Blue Sky Law of Ohio. It was contended that law was unconstitutional as a State law because the business and transactions there regulated were to some extent interstate commerce and that the Act challenged purported to regulate in a field of Federal power. The Supreme Court, by opinion of Mr. Justice McKenna, held the effect of the Act

was to impose merely an indirect burden upon interstate commerce, which was not sufficient to place such businesses or transactions regulated within the scope of Federal authority.

The authority of the Federal government within its sphere is exclusive. *Iroquois Transportation Co.* v. *DeLaney Forge & Iron Co.*, 205 U. S. 354, 51 L. Ed. 836. If this be true, it must conversely follow that the authority of the State within its sphere is exclusive.

The famed case of *Hammer* v. *Dagenhart*, 247 U. S. 251, commonly known as the "Child Labor case," is familiar to the Court. Whether or not the majority opinion in that case is still the prevailing view of this Court is unnecessary to a decision upon the point in the instant case. The point in the progress of the product about which this Act concerns itself is so far removed from the possible beginning of interstate commerce that either the majority or minority opinions in *Hammer* v. *Dagenhart* could be used as authority against the contention of interstate commerce here.

In several cases this Court has held that dealing in negotiable paper, even from one State to another, does not constitute interstate commerce. Thus in *Nathan* v. *Louisiana*, 8 How. 73, a broker engaged in buying and selling foreign bills of exchange through the mails was held not to be engaged in commerce, but merely supplying an instrument of commerce. In *Hemphill* v. *Orloff*, 277 U. S. 537, a business of buying and selling negotiable notes in various States was held not to constitute interstate commerce. In *Graniteville Manufacturing Co.* v. *Query*, 44 F. (2d) 64, affirmed in 283 U. S. 376, dealing in promissory notes between States was held not to constitute interstate commerce.

The interstate commerce clause of the Federal Constitution does not restrict the exercise of the State's police power. *N. Y. & N. H.* v. *N. Y.*, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418. State laws for the regulation of trade was among the

earliest exertions of the police power in this country. It has been persistent, and such laws have been widely applied to commodities "commonly sold in containers." *Pacific States Box & Basket Company* v. *White*, 296 U. S. 176, 56 S. Ct. Rep. 159. Until such time as a commodity actually commences its journey from one State to another, the State in which the commodity is located has full jurisdiction to regulate its manufacture and production. *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, 78 L. Ed. 1004.

Even though the subject matter of the Act is within the jurisdiction of Congress under the interstate commerce clause, yet *if Congress has not legislated specifically on the subject the State may do so.*[10] *Western Union Telegraph Company* v. *Crovo*, 220 U. S. 374, 55 L. Ed. 502, 31 S. Ct. 376; *Gulf C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98, 39 L. Ed. 910.

In *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, — U. S. —, 59 S. Ct. 528, the subject matter of the Act came far closer to approaching the status of interstate commerce than does the subject matter of the instant Act. In the *Eisenberg* case this Court considered an Act of the Commonwealth of Pennsylvania regulating the sale and distribution of milk and creating a Milk Control Board in that State with broad powers which among other things included the right to fix minimum prices to be paid by milk dealers to producers for milk. The Eisenberg Company purchased milk in Elizabethville, Pennsylvania, from approximately 175 farmers in the neighborhood and, without any processing of the milk, transported

[10] It is unnecessary here to cite the many cases by this Court construing whether or not a particular State law encroaches upon a field wherein the Congress has already legislated. Compare *Armour & Company* v. *State of N. Dak.*, 240 U. S. 510; *Savage* v. *Jones*, 225 U. S. 501; *Kelly* v. *Washington*, 302 U. S. 1. Here there is no contention that Congress has invaded or preempted the field.

the same to New York City for sale. The journey was continuous from Elizabethville to New York City and all milk purchased at Elizabethville was shipped to and sold in New York. The State Supreme Court of Pennsylvania affirmed a decree of a lower State Court restraining the enforcement of the Act against Eisenberg on the theory that the Act could not apply to his company because he was doing an interstate commerce business. The Milk Control Board of Pennsylvania conceded that Eisenberg's business was interstate commerce. This Court, upon appeal from the Pennsylvania Supreme Court, posed the question for decision as whether "in the absence of Federal Regulation the enforcement of the statute is prohibited by Article I, Section 8 of the Constitution". This Court held that Eisenberg was subject to the State Act notwithstanding his business was interstate commerce. We quote from the opinion:

> "This Court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority.[5] But in matters *requiring diversity of treatment according to the special requirements of local conditions*, the states remain free to act within their respective jurisdictions *until Congress sees fit to act* in the exercise of its overriding authority.[6] One of the commonest forms of state action is the exercise of the police power *directed to the control of local conditions* and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power,

the state law might thereby be restricted in operation or rendered unenforceable.' These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse."

We have already alluded to the case of *Sligh* v. *Kirkwood*, 237 U. S. 52, wherein this Court upheld a Florida statute which made it unlawful for any person to sell, offer for sale, ship or deliver for shipment, any citrus fruits which were immature or otherwise unfit for consumption. The particular Act was Chapter 6236, Laws of Florida, Acts of 1911. The extent of State power to enact police regulation to protect a State industry as opposed to the contention that the Act affected interstate commerce was considered by the court in an opinion written by Mr. Justice Day. We quote in part:

"Nor does it make any difference that such regulation incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt *to protect the people of the State* * * * So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the leg-

islature assuming the subject to be a proper matter of state regulation."

The State Act involved in the *Sligh* v. *Kirkwood* case directly concerned the sale and shipment of citrus fruits from Florida *without processing.*

Nor can the case of *Lemke* v. *Farmers Grain Company,* 258 U. S. 50, be relied upon as controlling authority to the contrary of appellants' contention. The North Dakota Act there involved had none of the vital elements present in the Act involved here. The preservation of the industry was not imperilled. A constant and dependable supply of grain (which was the subject matter of the North Dakota Statute) was not being endangered. There was no acute economic condition in North Dakota within the grain industry which gave rise to the passage of the Act. There was no processing of the grain. All of these things *were* facts found to exist by the legislature of Florida and which directly prompted the passage of the instant Act. Other distinguishing features between the facts in the *Lemke* case and the facts involved here may be noted. Mr. Justice Day wrote the opinions in both cases and the *Sligh* v. *Kirkwood* case dealt directly with the Florida citrus industry and a Florida law designed to protect that industry.

But even assuming for present purposes that the majority opinion in the *Lemke* case, written by Mr. Justice Day, is contrary authority, appellants insist that the views expressed in the minority opinion of the *Lemke* case written by Mr. Justice Brandeis, and concurred in by Mr. Justice Holmes and Clarke, is more compatible with the prevailing views of the majority of this Court as now constituted. Of the original members of the court who sat on the *Lemke* case, only Mr. Justice McReynolds is now a member of the court. Without intending to be presumptuous, appellants submit that Mr. Justice Brandeis's dissenting opinion would

today be the majority opinion in the *Lemke* case. The dissenting opinion (258 U. S. text 61, 66 L. Ed. text 465), reviewed the reasons which prompted the legislature of North Dakota to pass the Act. Fraud was being perpetrated in the unofficial inspection of the grain and by means of unconscionable bargains through which the farmer was not compensated for valuable dockage or *was not receiving a fair value for his grain.* It was said that the North Dakota legislation sought to protect the local farmer from these frauds practiced by local buyers by establishing a system of State inspection, grading, and weighing, requiring such inspection before grain could be purchased, protecting the farmer in the matter of dockage, and "*by requiring payment to the farmer of the fair value of grain,*—the value to be ascertained by fixing the so-called margin" (273 U. S. text 62-63; 66 L. Ed. text 465-466). After thus reviewing the evils which gave rise to passage of the Act and the object sought to be so accomplished thereby, the minority opinion in its pertinent parts holds:

> "Ordinarily, when a state's police power is exerted in connection with sales, it is the buyer whom the law seeks to protect; and the seller is licensed as part of the machinery to enforce the regulations prescribed. *I cannot doubt that the state has power as broad to protect the seller, and, to that end, to license the buyer.* Compare House *v.* Mayes, 219 U. S. 270, 55 L. Ed. 213, 31 Sup. Ct. Rep. 234. Ordinarily the function of inspection, grading, and measurement is committed to a public official or other impartial person. *But I am not aware of any constitutional objection to imposing the duty upon the buyer, where conditions demand it.* • • • The requirement that the buyer shall take only a proper margin for graded grain is, in effect, *requiring that he pay a fair price. Laws designed to prevent unfair prices are ordinarily enacted to protect consumers. But there is no constitutional objection to protecting producers against unconscionable bargains, if*

conditions are such that it is they who require protection. Nor can there be any constitutional objection to using, as a factor in determining what is fair, the price prevailing in terminal markets,—even if they happen to be located in another state.

Whether the purchases involved in this case were intrastate or interstate commerce we need not decide. For the fact that a sale or purchase is part of a transaction in interstate commerce does not preclude application of state inspection laws, *unless Congress has occupied the field, or the state regulation directly burdens interstate commerce.* That neither of these exceptions applies here appears from the description of the operation of the Federal and the state laws given below, in the opinion of Judge Amidon. • • •

To strike down this inspection law, instead of limiting the sphere of its operation, seems to me a serious curtailment of the functions of the state, *and leaves the farmers of North Dakota defenseless against what are asserted to be persistent, palpable frauds.*"

The above language by Mr. Justice Brandeis, it is confidently urged, conforms more closely to the views of the present prevailing majority of this Court.

Our contention in this matter is fortified by the opinion of this Court in *Townsend* v. *Yeomans*, 301 U. S. 441, 57 S. Ct. 842. In that case this Court considered a statute of Georgia fixing maximum charges for handling and selling leaf tobacco. Suit was filed by certain tobacco warehousemen in the Federal District Court to restrain enforcement of the State law on the grounds that it was a burden upon interstate commerce. It was conceded that practically all tobacco grown in Georgia went into interstate and foreign commerce. We quote from the opinion (301 U. S. text 455, 57 S. Ct. text 849):

"We are thus brought to the final contention of appellants that the State law although not in conflict with any exertion of Federal authority, must fall as being

repugnant to the existence of an exclusive Federal power although unexercised. The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as *demand a general system or uniformity of regulation; that in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act* (Cases cited).

In the instant case, the Georgia statute deals with a local need, exercising the state's protective power with respect to its own industry. A similar contention to that now advanced was held untenable in Munn *v.* Illinois, 94 U. S. 113, 27 L. Ed. 77, where state regulation of charges by the proprietors of grain elevators was sustained despite the fact that the elevators were used as instrumentalities by those who engaged in interstate commerce Id., 94 U. S. 113, at page 135, 24 L. Ed. 77. The point was again raised and overruled in Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 469, 36 L. Ed. 247, in upholding the New York statute regulating charges for 'elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses.' It was recognized that, in the actual state of the business, the passage of the grain to the city of New York and other places on the seaboard without the use of elevators would be practically impossible. The elevator at Buffalo was a link in the chain of transportation of the grain from the places where it was grown to the seaboard, but the Court said: 'So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates *only within the limits of that state*, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in Munn *v.* Illinois. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state, and other kindred laws.' Id., 143 U. S. 517, at pages 544, 545, 12 S. Ct. 468, 36 L. Ed. 247. Again in Brass *v.* North

Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, the statute of that state 'regulating grain warehouses and weighing and handling of grain' was held not to amount to a regulation of commerce between the states in the absence of a conflict with federal legislation, upon the authority of the Munn and Budd cases.

All these decisions but illustrate the principle that the mere existence of the congressional power, no conflict with its exercise being shown, does not deprive the states of their authority *to safeguard their local interests by legislation* which does not directly burden transactions in interstate or foreign commerce.

The cases upon which appellants rely are distinguishable. In Dahnke-Walker Company *v.* Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239, the statute held to be invalid imposed burdensome conditions upon the enforcement of rights arising from transactions in interstate commerce. In Lemke *v.* Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458, *the North Dakota statute of 1919* (Laws 1919, c. 138) *disclosed a comprehensive scheme to regulate the buying of grain in the course of interstate commerce.*''

The legislature of Florida found that the local grapefruit growers were threatened with extinction. They had been long oppressed by the canners, who had consistently, year after year, whittled down the price of the raw product and increased their own margin of profit to such point that they were able to pay the grower *just what they wanted the grower to have.* The entire industry was on the verge of collapse due to the inability of the grower to break even. The market conditions, about which plaintiffs exhort in their complaint, were largely caused by the unfair trade practices of the canners and their distributors, whose collective conscience was not at all stultified although they were choking the grower to death. Congress had failed to do anything about it and in such case, as pointed out by Mr. Justice Brandeis in his minority opinion in the *Lemke*

case, the State legislature was at liberty to deal with the critical condition which existed and alleviate the plight of the producer.

It is respectfully submitted (1) that the instant Act operates prior to the entry of the commodity into interstate commerce and (2) that even if the product was a part of interstate commerce it would still not be violative of the Federal Constitution because the Act does not impose any burden upon such commerce and because Congress has not legislated upon the subject.

IV. The Act Does Not Discriminate Against Plaintiffs, But Even If It Does, Plaintiffs Are Not Denied Equal Protection.

The complaint alleges that "many growers" process their raw product through their own canning plants while other growers can their own products through the medium of cooperative organizations (R. 5). It is alleged that "by reason of the foregoing facts", the canned product was being offered for sale "at prices which do not net the grower 32¢ per box on the tree" (R. 5). This was said to be discriminatory against plaintiffs. Such allegations are at best equivocal. It is not directly alleged that the grower *is not paid* his 32¢ per box whether his product is canned through his own canning plant or through the cooperative. Only the left-handed allegation is made that such product is being sold at prices which would not net the grower 32¢ per box. But the testimony was even weaker. Mr. Lindsey did not know whether the growers who owned canning plants had distinct corporate entities for the ownership of their plants and of their grove properties or not (R. 60). Nor did he know anything whatever regarding the legal setup of the cooperatives (R. 59-60). Mr. Elder gave no evidence concerning cooperatives (R. 63-67). On

the other hand Mr. J. F. Mays positively stated that the Act was being enforced against the cooperatives and grower canners the same as against the independent canners (R. 38-39). Mr. John A. Snively, President of a cooperative canning association, made affidavit that when his association could not sell the canned product at a price that would return the grower 32¢ a box, the association merely put the canned goods in storage. But he admitted that the canning cooperatives could pay the grower 32¢ per box by taking a loss on operation (R. 71-72), and Mr. Ralph Polk, Sr., stated that it was impossible for any canning corporation to know whether it was going to make a profit or sustain a loss by paying the grower 32¢ a box *until after the end of the season* (R. 73).

Thus the testimony fell short of showing even any appreciable difference, much less discrimination, between the enforcement of the Act against plaintiffs and against the cooperative or grower canners.

But the opinion of the court took a viewpoint on the question different from that alleged in the complaint or proved by the evidence. The opinion said that the testimony showed the cooperatives did not pay cash for their fruit to the grower, but merely "credited them" with 32¢ per box and "were not expected to pay (that much) for it unless the market prices enabled them to pay it" (R. 80). The opinion further held that the Commissioner did not enforce the law against the cooperatives but did enforce it against the independents and that the Commissioner "must have construed the Act so as to authorize him to do this" (R. 80).

Without discussing here the utter lack of support for the court's findings [11], it is respectfully submitted that, even

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[11] The accuracy of the findings made by the Court has been heretofore discussed, see p. 42, *et seq., supra.*

assuming such facts to exist, there is no unlawful discrimination against plaintiffs in violation of their rights under the equal protection clause of the Fourteenth Amendment. In the first place the court did not find as a fact that the members of the cooperatives would *not receive their 32¢ per box.* The finding was only that the cooperative was *not expected* to pay the grower his cost of production *unless the market prices enabled such payment. Non constant* market prices by the end of the season might be such as to enable the grower to receive *more* than 32¢. Can discrimination be assumed because of mere conjecture? Suppose the grower *did* receive his 32¢ per box at the end of the season from the cooperative, what would happen to the law in the meanwhile? It would be poor consolation to the grower of grapefruit in Florida to know ultimately that there had been no discrimination, if the Act had already long before been knocked out because of a *supposed or possible discrimination.* A "perchance" discrimination cannot be made the basis of a claim that equal protection is denied.

But the contention of discrimination must be dismissed upon still broader grounds. The Equal Protection Clause of the Federal Constitution merely requires State laws of like application to apply to *all persons similarly situated.* See *Barrett* v. *State of Indiana,* 229 U. S. 26, 33 S. Ct. 692; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, 56 S. Ct. 453. In the *Ten Eyck* case this Court sustained the milk control law of New York which authorized the State Board to fix a *differential* on the minimum prices at which milk could be sold to stores by milk dealers. Under the law milk dealers having a "well-advertised trade name" were required to sell their milk at a price of one cent per quart *more* than the minimum price prescribed for other independent milk dealers not having a "well-advertised trade name". The only distinction between the two classes of dealers was the existence of

the "well-advertised trade name". They were all independent milk dealers. We quote from the opinion (297 U. S. text 261, 56 S. Ct. text 455):

> "We hold that the fixing of the differential in favor of the sellers of milk not having a well-advertised trade-name, in the situation exhibited by the findings, does not deny the appellant equal protection.
>
> * * * Judicial inquiry does not concern itself with the accuracy of the legislative findings, but only with the question whether it so lacks any reasonable basis as to be arbitrary. Standard Oil Company *v.* Maryville, 279, U. S. 582, 586, 587, 49 S. Ct. 430, 73 L. Ed. 856."

The *Ten Eyck* case was previously before this Court as *Borden's Farm Products Co.* v. *Baldwin,* 283 U. S. 194, 55 S. Ct. 187, wherein the cause was remanded with directions to make findings of fact and conclusions of law after hearing evidence upon the issues joined. But in the *Baldwin* case the equal protection feature was commented upon. We quote in part from the opinion (293 U. S. text 209, 55 S. Ct. text 192):

> "When the classification made by the legislature is called in question, *if any state of facts reasonably can be conceived* that would sustain it, there is a *presumption* of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary (Cases cited). The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court."

In *Currin* v. *Wallace,* — U. S. —, 59 S. Ct. 379, the Supreme Court upheld as not discriminatory a Federal Act subjecting plaintiffs therein, as tobacco warehouse men, to certain inspection and certification with respect to sales conducted in their warehouses, even though other warehouse

men were doing the same sort of business in the same State and competing for patronage among the same growers as the plaintiffs without being subject to the Act.

Plaintiffs in the instant case make no contention that all independent canners are not treated alike, and hence, under the foregoing decisions, they cannot complain that the Act is discriminatory or that they are deprived of equal protection. Plaintiffs contended that the Commissioner was construing the Act not to apply to the cooperatives, and the opinion of the court seems to sustain such contention (R. 80). But even if so, the case would fall under the rule that "Mere errors of judgment by officials will not support a claim of discrimination. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be forced against the person claiming discrimination. To establish arbitrary discrimination inimical to constitutional equality there must be something more, something which in effect amounts to an *intentional* violation of the essential principle of practical uniformity," and the presumption is always in favor of honest purpose in the administration. *12 American Jurisprudence: "Constitutional Law", Sec. 566; Mackay Telegraph & Cable Co.* v. *City of Little Rock,* 250 U. S. 94, 63 L. Ed. 863, 39 S. Ct. 428; *Sunday Lake Iron Co.* v. *Wakefield Township,* 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495; *Concordia Fire Insurance Co.* v. *People,* 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830. And in other cases, this Court has held that if the State enforcement officer goes beyond the terms of the statute, he acts as a private citizen and not a State officer, and in such event the State courts, not the Federal courts, should be looked to for redress.

Barney v. *City of New York,* 193 U. S. 430, 25 S. Ct. 502;

Elgin National Watch Co. v. *Illinois Watch Case Co.,* 179 U. S. 665, 21 S. Ct. 270;

Leschen & Sons Rope Co. v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 26 S. Ct. 425;

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312.

In the recent case of *United States* v. *Rock Royal Co-Op.*, — U. S. —, 59 S. Ct. 993, this Court considered the validity of a certain order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act regulating the handling of milk in the New York Metropolitan area. The United States sought by mandatory injunction in the District Court to coerce obedience to said order on the part of certain milk dealers. The District Court dismissed the complaint of the government. Upon appeal, this Court reviewed the many contentions made against validity of the order, including a contention made by an independent milk dealer that the order was unreasonably discriminatory because the cooperative dealers were not required to pay producers a uniform price whereas the independent dealers were so required by terms of the order. The direct point was there contended, which is now contended by plaintiffs in the instant case. In dismissing such contention, this Court in the *Rock Royal* case held: [12]

> "Certain provisions of the Order were found by the District Court to show unconstitutional discrimination against one or more of the defendants. The discriminations of which complaint is made arise from the application of the New York problem of Section 8c (5) of the Act relating to milk:
>
> A. *Uniform Price.* The Jetter Dairy Company, a proprietary handler, urges that *as milk cooperatives*

[12] The opinion in the *Rock Royal* case listed the cases supporting the text in marginal notes, therefore the quotation from the opinion as above given refers only to the *holdings* of previous cases. But the citations thereof may be derived from the margin of the opinion.

need not pay producers a uniform price, it is unreasonably discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In Section 8c (5) (F) there is a definition of the type of cooperative permitted to settle with its members in accordance with the membership contract. *The general characteristics of cooperatives are well understood.* The Capper-Volstead Act defines such cooperatives as associations of producers, corporate or otherwise, with or without capital stock, marketing their product for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealings limited to 50 per cent non-member product. Different treatment has been accorded marketing cooperatives by State and Federal legislation alike. Indeed the Secretary is charged by this Act to 'accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.' These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. *The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment. Frost* v. *Corporation Commission in fact recognized the validity of such classification.* The Commission was enjoined from isguing a license for the operation of a cooperative cotton gin under a proviso directing it to do so on petition of 100 citizens and taxpayers without the showing of public necessity required for other ginners. The applicant was organized for profit, though dividends were limited, and its membership was not confined to producers. The court thought the distinctions had no reasonable relation to the subject of the legislation, special opportunities for cooperatives. It was said the court had 'no reason to doubt' that the classification was valid as applied to true cooperatives.

The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons.

The commodity handled by a cooperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost, one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread, On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price. The cooperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the cooperators' reaction would parallel those of stockholders of losing businesses. Neither the Act nor the Order protects anyone from lawful competition, nor is it essential that they should do so. *We do not find an unreasonable discrimination in excepting producers' cooperatives from the requirement to pay a uniform price.*"

The tenth headnote of the *Rock Royal* case is as follows:

"The provision of milk marketing order issued by Secretary of Agriculture excepting producers' cooperatives from requirement to pay a uniform price is not unreasonably discriminatory, *in view of distinctions between cooperatives and business organizations.*"

Florida has by statute since 1917 provided expressly for the formation of "cooperative associations". See Sections 6385 to 6390, Compiled General Laws of Florida, 1927. Also by Chapter 9300, Laws of Florida, Acts of 1923, the Florida legislature specifically provided for the formation of cooperative marketing associations for the distribution and marketing of agricultural products. This Act is shown as Sections 6466 to 6494 inclusive, Compiled General Laws of Florida, 1927.

Without further argument it is respectfully submitted: (1) the facts found by the three-Judge Court in its opinion do not show discrimination in fact, and (2) that even if discrimination in enforcement between the cooperative canners and the independent canners were shown, such discrimination would not be sufficient to deny the independent canners equal protection under the Federal Constitution.

V. The Price Fixing Feature of the Act Does Not Infringe Against the Fourteenth Amendment

Plaintiffs in their complaint wax eloquent in their denunciation of the law as a legitimate exercise of the State's police power. They say the law is unreasonable, arbitrary, vague, prejudicial, deprives plaintiffs of their property without due process of law, and impairs the freedom of contract (R. 5, 11, 14, 17, 35, 36). All of these contentions boiled down mean simply that the State, in the exercise of its broad police powers over a major State industry, has no authority to fix a minimum price to be paid to the producer for his raw product in years of emergency, such minimum prices to be merely his cost of production. The burden of plaintiffs' allegations is that the canners "at the current market prices" stand to lose money if they have to pay the grower 32¢ per box. The canners say that if anyone must take a loss it must be the grower, notwithstanding the grower, as the producer of the raw article, is primarily

responsible for the perpetuation of the industry. This is the gist of all of the voluminous allegations in the complaint. But when it came to the testimony, upon which the court acted in knocking out the law, plaintiffs did not make as strong a showing as they did in their complaint. The testimony of Mr. Ralph Polk, Sr. was to the effect that *none of the independent canners would know, if they paid the grower 32¢ a box, whether they would make a profit or sustain a loss, until after the season was over* (R. 73).

The court in its opinion held that the legislature of Florida was without power to authorize the fixing of a cost of production and to prescribe that the grower must in any event receive that amount for his fruit in years of emergency (R. 80). The court was of the opinion that the return to the grower must be determined by the law of supply and demand and could not be dealt with by legislative fiat. The court held that the price of 32¢ per box fixed by the Florida Citrus Commission was unreasonable and arbitrary because the canner could not pay the grower such amount "without sustaining a loss" (R. 79). The court also grounded its conclusion that the law was "arbitrary and prejudicial" upon the theory that a grower might be able to receive $8,000 for his crop which cost him $10,000 to produce, yet under the Act would "lose the whole crop". It is unnecessary to dwell upon this last observation of the court because no growers were in court complaining.

The point here involved presents for consideration the question of the authority of the State legislature to authorize the fixing, in years of emergency, within its major industry, of a minimum price to be paid to producers in that industry, which minimum price covers only the cost of production. There is more argument in support of the provisions of the instant law than in the usual so-called price fixing laws. There are two features of the instant Act which renders it less vulnerable to attack. First, the Act only

operates in those years when the citrus industry in Florida, which emergency must be found and proclaimed by the joint action of the Governor and Commissioner of Agriculture of Florida; and second, in such years of emergency the Act only attempts to guarantee the producer a return equal to his cost of production.

The instant Act was not designed to provide the producer with any margin of profit for his product. The Act was merely intended to preserve the industry by enabling the producer to survive in those years when he was threatened with extinction. The Florida Citrus Commission, which under the Act determines the cost of production after an emergency has been proclaimed, is by statute composed of "eleven practical citrus fruit men" all resident citizens of Florida who have been actively engaged in the citrus business in that State for not less than five years prior to appointment, and who have derived their major income from the industry. Chapter 16,854, Laws of Florida, Acts of 1935, as amended by Chapter 17,775 Laws of Florida, Acts of 1937. Members of the Commission are State officers under the Act. The power is thus reposed in responsible hands.

The general subject of price fixing in State Regulatory Acts has been the source of much litigation, as well as contrariety of opinion, in this Court.

The earlier decision of this Court, while not so important as the later ones, should be briefly reviewed in tracing the legal philosophy of this Court on the question.

In the case of *Munn* v. *People of Illinois*, 94 U. S. 113, 24 L. Ed. 77, decided in 1877, this Court upheld as constitutional a State statute of Illinois fixing the maximum charges for the storage of grain in warehouses in cities of Illinois having not less than 100,000 inhabitants. The Act was attacked on the ground it violated the interstate commerce clause and the Fourteenth Amendment. After reviewing

the extent of the exercise of the police power to regulate industries for the public good, this Court stated:

"From this it is apparent that, down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. * * *

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle. * * * For our purposes we must assume

that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner. * * *

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even thought it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the Legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the Legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to

which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But the mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."

The opinion in the *Munn* case, *supra*, was written by Mr. Chief Justice Waite with Mr. Justices Field and Strong dissenting.

The majority opinion in the *Munn* case was followed in principle in *Budd* v. *New York*, 143 U. S. 517, 36 L. Ed. 247, *Brass* v. *North Dakota*, 153 U. S. 391, 38 L. Ed. 758, and *Cotting* v. *Godard*, 183 U. S. 79, 46 L. Ed. 92. In the *Cotting*

case while the *power* of the legislature to prescribe charges for services rendered by the stockyards in the State of Kansas was upheld, it was held that such charges must be uniform as between the large and small operators.

In *C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 55 L. Ed. 328, this Court upheld an Iowa statute which precluded the railroad company from making the defense in negligence suits brought by employees that recovery was barred by acceptance of benefits under a contract of membership in its relief department. The Act was challenged on the ground that the statute violated the Fourteenth Amendment by reason of the restraint it laid upon the liberty of contract. Upon this point the opinion of this Court, written by Mr. Justice Hughes, says:

> "The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern; as, for example, the regulation of commerce with foreign nation and among the several States (cases cited).
>
> It is subject, also in the field of State action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the State to require reasonable maximum charges for public service (cases cited), and to prescribe the hours of labor for those employed by the State or its municipalities (cases cited), this Court has sustained the validity of State legislation in prohibiting the manufacture and sale of intoxicating liquors within the State (cases cited); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day, except in cases of emergency (case cited); in prohibiting the sale of cigarettes without license (case cited); in requiring the redemption in cash of store

orders or other evidences of indebtedness issued in payment of wages (case cited); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (case cited); in prohibiting the employment of women in laundries more than ten hours a day (case cited); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine: (case cited).

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

The principle was thus stated in *McLean* v. *Arkansas*, *supra*, pp. 547, 548; 'The legislature, being familiar with local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power (cases cited). * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to

enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public "within the scope of legislative power, the act must fail."

In *Settler* v. *O'Hara*, before this Court in April, 1917, a decision of the State Supreme Court of Oregon, affirming a decree of a lower State court refusing to enjoin the enforcement of an Oregon statute fixing a minimum wage for women, was affirmed by an equal division of this Court, 243 U. S. 629, 61 L. Ed. 937. Mr. Felix Frankfurter, now a Justice of this Court, was attorney for respondents before this Court seeking to uphold the validity of the State law.

In the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, decided by this Court in April, 1923, a congressional Act providing for the fixing of minimum wages for women and children in the District of Columbia, was held unconstitutional. Mr. Justice Sutherland wrote the majority opinion, while Mr. Chief Justice Taft wrote a dissenting opinion, concurred in by Mr. Justice Sanford, and Mr. Justice Holmes wrote a second dissenting opinion. Mr. Justice Brandeis took no part in the decision. The Act was attacked on the ground that it interfered with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. The dissenting opinions in the *Adkins* case is today the prevailing law.[13]

In *Charles Wolff Packing Company* v. *Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, 67 L. Ed. 1103, a State law of Kansas providing for the fixing of wages in industries affected with a public interest was held unconstitutional, in opinion written by Mr. Chief Justice

[13] See *West Coast Hotel* case, *infra*, p. 104.

Taft, as a taking of property and infringement upon liberty of contract without due process of law, in violation of the Fourteenth Amendment.

In *Tyson, etc.* v. *Banton*, 273 U. S. 418, 47 S. Ct. 426, decided by this Court in February 1927, a State law of New York fixing a maximum charge at which ticket brokers could resell amusement or theatre tickets to the public was held to contravene the Fourteenth Amendment by unduly restricting the freedom of contract. The majority opinion was written by Mr. Justice Sutherland. Mr. Justices Holmes, Stone, Sanford, and Brandeis dissented with separate dissenting opinions being written by the first three named dissenting justices. A portion of the dissenting opinion of Mr. Justice Stone is considered pertinent (273 U. S. text 450, 47 S. Ct. text 435):

> "It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may be also assumed that as a general proposition, under the decisions of this Court, the power of State governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power, before concluding that it may not be exercised here.
>
> The phrase 'business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be

regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is 'free' competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.

Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, *so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community.* Whether this situation arises from the monopoly conferred upon public service companies or *from the circumstances that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell,* buy or consume, as in Munn *v.* Illinois, *supra;* or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in German Alliance Ins. Co. *v.* Kansas,

supra; or from a housing shortage growing out of a public emergency as in Block *v.* Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; Marcus Brown Co. *v.* Feldman, 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. *v.* Siegal, 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (cf. Chastleton Corp. *v.* Sinclair, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841)—*the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.*"

In *Ribnik* v. *McBride,* 277 U. S. 350, 48 S. Ct. 545, decided by this Court in May, 1928, a State statute of New Jersey conferring upon a State officer the power to fix prices which employment agents could charge for their services was held to violate the due process clause of the Fourteenth Amendment. The majority opinion was written by Mr. Justice Sutherland while Mr. Justice Stone wrote a dissenting opinion concurred in by Mr. Justice Holmes and Mr. Justice Brandeis. Mr. Justice Sanford concurred in the majority opinion upon the controlling authority of *Tyson* v. *Banton,* in which case he had dissented. The majority opinion in the *Ribnik* case, as in the earlier cases, grounded its judgment striking down the State law on the theory that the business attempted to be regulated was not affected with a public interest. We again quote from a portion of Mr. Justice Stone's dissenting opinion (277 U. S. text 359, 48 S. Ct. text 547):

> Under the decisions of this Court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a State Legislature when the business concerned is 'affected with a public interest.' That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only

such meaning as may be given to it by the decisions of this Court. As I read those decisions, such regulation is within a State's power whenever any combination of circumstances seriously curtails the regulative force of competition, *so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a Legislature might reasonably anticipate serious consequences to the community as a whole* (Cases cited). *The price regulation may embrace businesses 'which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation'* (Case cited). The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the 'public interest' exists. *Wolff Co.* v. *Industrial Court, supra*, 538 (43 S. Ct. 630). *The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the 'public interest' and to justify the regulation of contracts with its members.* (Knoxville Iron Co. *v.* Harbison, *supra;* McLean *v.* Arkansas, *supra;* Mutual Loan Co. *v.* Martell, *supra*), and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other times or in other places would be a matter purely of private concern. (Block *v.* Hirsh, *supra*, 155 (41 S. Ct. 458)). * * *

Some presumption should be indulged that the New Jersey Legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, *for the validity of a regulation 'turns 'upon the existence of conditions, peculiar to the busi-*

ness under consideration.' Tyson *v.* Banton, *supra*, 438 (47 S. Ct. 431). Moreover, we should not, when the matter is not clear, expose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals. 'This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' Adkins *v.* Children's Hospital, 261 U. S. 525, 544, 43 S. Ct. 394, 396 (67 L. Ed. 785, 24 A. L. R. 1238). And the enactments of State Legislatures are entitled to no less respect."

In *Williams* v. *Standard Oil Company*, 278 U. S. 235, 49 S. Ct. 115, decided by this Court in January, 1929, a State statute of Tennessee providing for the fixing of prices for gasoline was held invalid as the taking of property without due process of law contrary to the Fourteenth Amendment. The majority opinion, written by Mr. Justice Sutherland, held that the business of selling gasoline was not affected with a public interest, following the reasoning of the majority opinions in the previously cited case. Mr. Justice Holmes dissented while Mr. Justice Brandeis and Mr. Justice Stone concurred in the result.

The trend of the legal philosophy of this Court, foreshadowed by the strong dissenting opinions in the foregoing cases, was shown in the case of *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 51 S. Ct. 130, decided in January, 1931, wherein a New Jersey statute, limiting an insurance agent's commission on fire insurance policies to a reasonable amount, not exceeding that paid other local agents, was upheld by this Court as against the contention that it denied due process of law. The majority opinion is by Mr. Justice Brandeis while Mr. Justices Van DeVanter, McReynolds, Sutherland and Butler dissented. The majority opinion held that the business of insurance was so far af-

fected with a public interest that the State could regulate the rates and likewise regulate the relations of those engaged in the business. We quote from the majority opinion (282 U. S. text 257, 51 S. Ct. 132):

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the Constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey *evils did not exist* in the business of fire insurance *for which this statutory provision was an appropriate remedy.* The action of the legislature and of the highest court of the State, indicates that *such evils did exist.* The record is barren of any allegation of fact tending to show unreasonableness."

In *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 54 S. Ct. 505, an order of the Milk Control Board of the State of New York requiring milk distributors to charge 10 cents and storekeepers 9 cents per quart for sale of milk to consumers was held not unreasonable or arbitrary or a denial of due process of law to the storekeeper. Mr. Justice Roberts wrote the majority opinion while Mr. Justice McReynolds wrote a minority opinion, joined by Mr. Justices Van DeVanter, Sutherland, and Butler. The order which was upheld was pursuant to the authority contained in a State law of New York establishing a board with power among other things, to fix minimum and maximum retail prices to be charged by stores to consumers for milk. We quote excerpts from the majority opinion:

"Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. *Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.*

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, *the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets,* and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. * * *

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid

for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. • • •

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. • • • But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. *The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago.* Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77. • • •

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. *v.* Court of Industrial Relations, 262 U. S. 522, 535, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. The phrase 'affected with a public interest' can, in the nature of things, *mean no more than that an industry,*

for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expression 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed as business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. *But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.* • • • Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, *threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself,* appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted *fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public.* And this is especially so where, as here, the economic maladjustment is one of price, *which threatens harm to the producer at one end of the series and the consumer at the other.* The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

The *Nebbia* case, while it did not so declare in words, completed a definite swing of the judicial opinion of this Court to the doctrine long contended for by the minority in the many cases previously decided by this Court and hereinbefore cited.

In the case of *Hegeman Farms Corporation* v. *Baldwin, et al.*, 293 U. S. 163, 55 S. Ct. 7, an order of the New York Milk Control Board, issued under the same Act upheld in the *Nebbia* case, requiring a wholesale milk dealer to pay to producers the difference between what he had actually paid them and what he was required to pay them under a previous price fixing order, as a condition for reinstatement of license as a milk dealer, was upheld as against the contention that it violated the Fourteenth Amendment. In the *Hegeman Farms* case one of the contentions seriously urged upon this Court was that the milk dealers there involved could not pay to the producer the price fixed in the Board's order *without losing money*, and the comment of this Court upon such contention is illuminating in the light of similar contentions made by one or two of the plaintiffs in the instant case as a principal basis of their attack on the Act here involved. We quote:

> "The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit. * * *
>
> True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the board. To make the selling level higher might be unfair to the consumers; to make the purchasing level

lower might bring ruin to producers. *The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts.* If the designation of a minimum price is within the scope of the police power, *expenses or losses made necessary thereby must be borne as an incident;* unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition. Public Service Comm. of Montana *v.* Great Northern Utilities Co., supra, at page 135 of 289 U. S., 53 S. Ct. 546. It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities. * * *

True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, *but the small producer may be helped, and an industry vital to the state thus rescued from extinction.* Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose of its framers. Nebbia *v.* People of State of New York, supra, pages 515, 516 of 291 U. S., 54 S. Ct. 505. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favor-

itism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof."

In *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, decided in March, 1937, by opinion of Mr. Chief Justice Hughes, this Court upheld an Act of the State of Washington creating a State Commission with power, among other things, to fix minimum wages for women and minors employed in that State. The ground of attack was that it violated the Fourteenth Amendment by abridging the freedom of contract. Mr. Justice Sutherland wrote a dissenting opinion, concurred in by Mr. Justices Van De-Vanter, McReynolds and Butler. The majority opinion exhaustively reviewed the earlier decisions, particularly that of *Adkins* v. *Children's Hospital, supra.* The court expressly overruled the majority opinion in the *Adkins* case and adopted the minority views expressed by Mr. Justices Taft and Holmes therein. The burden of the minority opinion in the *West Coast Hotel* case was that the majority opinion in the *Adkins* case was good law and should be adhered to. While the *West Coast Hotel* case was a *wage* fixing Act dealing with the relation of employer and employee, as distinguished from a *price* fixing law dealing with the sale of a commodity, the principle is the same. In fact, this Court in the *West Coast Hotel* case cites and quotes from many of the earlier price fixing cases, such as the *Nebbia* case, as authority for its holding. The opinion in the *West Coast Hotel* case is rather lengthy and, in view of the extended quotations made from the earlier cases, need not be quoted from here. Suffice to say that, like the *Nebbia* case and the *O'Gorman* case, the *West Coast Hotel* case adopted as the prevailing view of the court the principles contended for in the minority opinions in the previous cases.

In *Townsend* v. *Yeomans, supra,* decided in May, 1937, this Court, in opinion of Mr. Chief Justice Hughes, upheld a Georgia statute fixing maximum charges for the handling and selling of leaf tobacco by warehousemen. The statute was assailed as an arbitrary and capricious exercise of State power, in violation of the Fourteenth Amendment. This Court said:

> "So far as the present controversy turns upon the power of the state to give this sort of protection to this industry, provided its regulation is not arbitrary or confiscatory and in the absence of conflict with the federal power over commerce, our rulings are decisive in support of the state action. * * * Appellants contend that the legislative action was taken without investigation and hence must be considered to be arbitrary and beyond the legislative power. There is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation. The result of particular legislative inquiries through commissions or otherwise may be most helpful in portfaying the exigencies to which the legislative action has been addressed and in fortifying conclusions as to reasonableness. Nebbia *v.* New York, *supra,* 291 U. S. 502, at page 516, *et seq.,* 54 S. Ct. 505, 507, *et seq.,* 78 L. Ed. 940, 89 A. L. R. 1469. But the Legislature, acting within its sphere, is presumed to know the needs of the people of the state. Whether or not special inquiries should be made is a matter for the legislative discretion. Here, the existence of the industry, highly important to the state, the transactions in the tobacco markets, *the necessity of protecting the growers from exorbitant warehouse charges,* must be presumed to have been fully known to the members of the Legislature and this presumption cannot be overthrown, as it has been sought to be overthrown, by testimony of individual legislators."

In *Highland Farms Dairy, Inc.* v. *Agnew,* 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835, decided in March, 1937, a State

law of Virginia creating a Commission with power among other things to fix "market areas" within the State and to fix minimum and maximum prices to be charged for milk and cream therein, was upheld by this Court in opinion written by Mr. Justice Cardozo, wherein Mr. Justices Van De-Vanter, McReynolds, Sutherland and Butler dissented. It was said by this Court that "The power of a state to fix a minimum price for milk *in order to save producers,* and with them the consuming public, *from price cutting so destructive as to endanger the supply*", had been affirmed in the *Nebbia* case, the *Hegeman Farms Corporation* case and the *Ten Eyck* case. Both the opinion of this Court and also the opinion of the lower Court (16 F. Supp. 575) give full summaries of the Virginia Act involved. This Court will particularly observe that the preamble to that Act, containing findings made by the legislature, *follows very closely the preamble to the instant Act.*

The influence of the recent decisions of this Court has been plainly exhibited in the late decisions of the lower Federal Courts (except in the instant case). Thus in *Feldman* v. *City of Cincinnati,* 20 F. Supp. 531, the District Court upheld as against challenge under the Federal Constitution, an Ordinance of the City of Cincinnati prescribing hours during which barber shops may be open for business. In *Paramount Picture* v. *Langer,* 23 F. Supp. 890, the District Court upheld as against attack under the Fourteenth Amendment a State statute of North Dakota prohibiting the operation of motion picture theatres which were owned, controlled, managed, or operated, in whole or in part, by producers or distributors of motion picture films. The Circuit Court of Appeals for the First Circuit has recently, on June 13, 1939, upheld the Constitutional validity of an Act of Porto Rico, and regulatory order issued thereunder, fixing the price of sugar. *Vidal* v. *Fernandez,* 104 F. (2d) 606. And

District Judge Stephens of the Southern District Court of California in *Bristol Myers Company* v. *Tischauser*, 18 F. Supp. 228, refused injunction to restrain enforcement of the California Fair Trade Act which prohibits the retailing of factory marked goods in competition through regular course of business at less than factory fixed prices, either by one contracting to maintain the price, or by one who has secured the goods from other than factory sources. In the course of his opinion Judge Stephens made the following observation which might well apply to the three-Judge Court below:

> "Laws enacted to meet new conditions in our complex and changing civilization come in contact with judicial minds long accustomed to certain economic practices and conceptions and are very apt to be pressed to the ordeal of squaring with such practices and conceptions in their test of constitutionality. This practice constitutes nothing less than extra judicial exercise of the veto power."

Under the later cases decided by this Court, it is doubtful if necessary that a business be shown to be affected with a public interest in order to sustain a price fixing statute regulating such business. The rule now is that "price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia* case *supra*. But the instant Act may be sustained whether tested upon the standard just quoted or upon the standard of whether the business is affected with a public interest.

In *Sligh* v. *Kirkwood*, *supra*, this Court in 1915 took judicial notice that the citrus industry in Florida was a major industry. If the citrus industry was a major industry in 1915, it is certainly a major industry today,

twenty-five years later. It clearly is a business affected with a public interest in Florida.

The Florida Supreme Court, in the case of *Miami Home Milk Producers Assn.* v. *Milk Control Board,* 124 Fla. 797, 169 So. 541, upheld the validity of a State law creating a milk control board in Florida with power to fix the minimum price at which milk might be sold. The Act there involved contained a preamble setting forth a legislative finding of facts very similar to the finding of facts made in the preamble to the instant Act (169 So. 541). It was held that the legislative determination of such facts must be upheld by the Courts unless plainly contrary to common knowledge or clearly shown by allegation and proof to be false. The price fixing features of the Act were upheld upon authority of the foregoing decisions of this Court.

Also in *Miami Laundry Company* v. *Florida Dry Cleaning & Laundry Board,* 134 Fla. 1, 183 So. 759, the Florida court upheld, as against attack under the due process clause of the Fourteenth Amendment, a State law creating a State Laundry Board with power, among other things, to fix a schedule of prices to be charged for laundry and dry cleaning service within the State. The laundry business was held to be clothed with or affected with, a public interest, at least that it was of such proportion that the interest of the public demanded that it be reasonably regulated even to the point of price fixing.

From all the foregoing decisions, it is respectfully submitted that the feature of the instant Act authorizing the determination and fixing of a cost of production which the grower must be guaranteed in years of emergency should be sustained. If the laundry business in Florida is affected with a public interest, or if the conditions within that industry are such as to make reasonably necessary a law containing the authority to fix prices, then certainly the busi-

ness of raising and producing citrus fruit in Florida is a business affected with a public interest and subject to at least equal regulation.

The Act only guarantees to the grower what it actually costs him in dollars and cents to produce his current crop. The Act only operates in years of emergency and such emergency must be found and declared by the Governor and Commissioner of Agriculture. A competent State authority is designated to determine the cost of production when the emergency is declared. If the canners made previous contracts at prices which would not enable them to pay the grower his cost of production, such fact cannot avail the canner as an argument against the validity of the law. In the first place, he knew the law was on the books when he made his contract. The law was passed in 1935. He made his contracts with full notice of the provisions of the law and with full knowledge that in any season an emergency might arise which would call for the invocation of the law. In the second place, and possibly more fundamental, the canner is in a decidedly awkward position to insist that his contract be upheld when he admits that the price therein fixed for the processed product was such that the grower would not be paid what it actually cost him to produce the fruit, although at the same time the canner was allowing for himself a nice margin of profit. This is an instance of the very unconscionable trade practices and trade conditions and evils within the industry that brought about the passage of the law. To sustain the contentions of the canners, that because they cannot make a profit if they have to pay the grower his cost of production and therefor the Act is unconstitutional, would be to place unrestricted power in the hands of the canner to completely frustrate any legislative attempt to protect the grower. All the canner would ever have to do would be

to so pad or juggle his operating cost, or for that matter to increase his margin of profit, to such extent as to leave a balance for the grower below the cost of production. In other words, what the canner says now, that he cannot make a profit and pay the grower 32¢ per box, is what he can say in any year under any contracts he has outstanding. He would merely have to figure his operating cost or his margin of profit at such a figure as would leave an insufficient amount for the grower. Statutes are not declared unconstitutional upon such a shallow premise.

The legislative findings of fact, stated in the preamble to the instant Act, are clearly ample to show a condition within the industry that sustained this character of regulation. The citrus industry is the largest production industry in Florida. The legislature found that the grower had been crushed under the oppressive practices of the canner and shipper almost to the point of extinction. This Act stands as a bulwark for the protection of the grower. While he is still at the mercy of the dealer as to what margin of profit he might make, he at least knows he can live.

It is unnecessary to dwell at length upon the contention made that the fixing of 32¢ per box as the cost of production was so unreasonable as to constitute a denial of property rights without due process of law (R. 13). The record shows that the Commission proceeded properly in ascertaining what was a fair figure. Five affidavits on behalf of defendants attest to this fact (R. 36-44). Not a word of testimony was adduced to the contrary by plaintiffs. The Regulation on its face, as unanimously adopted by the Commission, also shows a careful compliance with the law. Even the three-judge court found no fault with the Commission in its method of arriving at the cost price.

It is submitted that both the Act and the Regulation are constitutional and do not infringe upon the rights of plaintiffs under the Fourteenth Amendment.

VI. The Court Should Not Have Enjoined Enforcement of the Regulation in Absence of Affirmative Showing of Non-Compliance With the Act in Promulgating Same

The court below held in its opinion that the Commissioner must be enjoined from enforcing "the fixed price" because there was "no proof in the record" that the Commission had obtained a consent and agreement to abide by the Regulation from those not subject thereto (R. 80).

The Act in this particular is admittedly rather vague. It provides that after an emergency has been declared the Citrus Commission shall proceed with its duties in determining and fixing the cost of production (R. 19). Among those duties is to procure "from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms" (R. 19). The Regulation as adopted recites that "The Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said Act". By this declaration the Florida Citrus Commission made a determination of fact that there were no persons in the industry from whom it was necessary to procure agreements as mentioned in the Act. Whether there *might* be such persons *in other years or under other conditions* is immaterial to a consideration of the point. The fact here presented is that the Commisison determined that, at the particular time this Regulation was adopted and under the particular circumstances then obtaining within the industry, all handlers, (and of course all producers) in Florida were subject to the Act. This was certainly just as strong as if any of such members of the industry had signed agreements to abide by the Regulation. The Commission merely stated that all handlers, whether they wanted to or not, or

whether they would otherwise be subject to the Act or not, would be bound automatically by the Regulation. In any event, the independent canners were in no position to complain. They did not state to the court what handlers not subject to the Act had failed to sign binding agreements. They did not take issue with the determination of the Commission that all handlers were subject to the Act.

Also it is submitted that this particular provision of the Act is not mandatory but merely directory. The local law would prevail in the construction of said provision, and the Supreme Court of Florida, in *Apgar* v. *Wilkinson*, 95 Fla. 457, 116 So. 78, has held that similar wording in a statute merely constitutes an authorization or clothing of State officers with power and authority to do the things enumerated rather than to impose mandatory duties. It was held that "Where mandatory words or provisions are written in statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless something in the body of the act is indicative of the contrary view".

In the second place, it seems frankly apparent that such language in the instant Act is meaningless. Certainly all producers, shippers, or handlers of citrus fruit in Florida are subject to the Act. And if they are so subject to the Act they are bound by the provisions thereof by the terms of the Act itself and no necessity arises for procuring any binding agreements from any of them or to indulge in any attempted supertechnical analysis of the Act to determine what the language meant. Again resorting to the local rule of construction, the Supreme Court of Florida, in *Therrell* v. *Smith*, 124 Fla. 197, 169 So. 388, held that where a proviso can be given no sensible effect, or is so worded that it cannot be with certainty said to mean any particular thing, it shall and will be entirely disregarded.

In the third place, the matter is not one for Federal jurisdiction. If the Florida Citrus Commission has proceeded contrary to the face of the Act, it is a matter for the State courts and not the Federal courts. See *Barney* v. *City of New York, supra, Home Telephone & Telegraph Company* v. *City of Los Angeles, supra.* No ground of Federal jurisdiction can be predicated upon such alleged wrongful action of the State Commission.

The District Court in its opinion held that there was "no proof in the record" (R. 80) that the Commission had secured such consent and agreement from producers and others not subject to the provisions of the Act, and that because of such lack of proof, the State Commissioner should be enjoined from enforcing "the fixed price". It was held that while this feature of the case might not render it violative of the Constitution it would "certainly" require injunction. The District Court thus applied a wholly untenable rule in placing the burden upon the *proponents* of the State law to show their *right* of enforcement, rather than upon those *challenging* the States law to show why enforcement should be restrained. Merely to say there was no proof in the record that the Commission had acted in pursuance of the law was not to deny that the Commission had acted lawfully.

It is respectfully submitted (1) that the proof before the court was ample to show that the Commission *had* proceeded properly, and (2) that if the Commission had in fact not proceeded properly the burden was upon the plaintiffs challenging the Regulation to show such fact of non-compliance, and (3) in the absence of proof either way, the court should have ignored such contention, and (4) it was a matter for the local courts, not the Federal courts to determine.

VII. The Court Should Not Have Granted Interlocutory Injunction

The order granting the interlocutory injunction recited affirmatively on its face that it was being granted "for the reasons to be expressed in an opinion to be filed later" (R. 75). The opinion which was filed later discussed *exclusively* the constitutionality [14] of the Act and after holding the Act invalid on several grounds the opinion stated: "We therefore conclude that the injunction should be granted" (R. 81). By these statements contained in the court's own order and opinion, it conclusively appears that the interlocutory injunction was granted *solely because the Act was unconstitutional.* This being so, if the lower court was in error in its judgment on the constitutional question, it would follow that the interlocutory injunction should not have been granted. Where the reason for an order of court falls the order itself falls.

Aside from this, however, a consideration of the entire record demonstrates that the interlocutory injunction should have been denied. The court was dealing with a seasonal subject matter. And it was at the *critical time of the season* that the court was called upon to issue the interlocutory order.

The existence of a State emergency in the citrus industry had been proclaimed by the Governor and Commissioner of Agriculture on January 13, 1939 (R. 31). Acting promptly, the Florida Citrus Commission, on January 16, 1939, promulgated the Regulation fixing the cost of production (R. 32). The Regulation was, by its terms, to become effective January 20, 1939. But plaintiffs waited until

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[14] The only exception is the point discussed under the last preceding section of the brief (pp. 111-113), but it does not alter the argument here made.

March 23, 1939 (R. 1), over two months later, before they filed their complaint in court alleging that the Act and Regulation were unconstitutional. The three-judge court did not convene until April 10, 1939 (R. 45), and the order granting interlocutory injunction was not filed until April 28, 1939 (R. 75-76). The canning season runs from about November until the following June or July (R. 6).

The foregoing facts should have operated to make the court exercise care before issuing an interlocutory injunction. The court must have realized that such an order would, so far as the current season is concerned, have the full effect of a permanent injunction. The delay in filing the suit was entirely the fault of plaintiffs and at the hearing plaintiffs showed no facts whatever in excuse or explanation of their delay. Nor did they show any great and irreparable injury which they would suffer by reason of the Act, even if they had been diligent in filing the suit. The growers had already suffered from March 23rd to April 28th, by a suspension of the enforcement of the Act through a restraining order issued without notice (R. 32-33).

Rules governing the granting or denying of an interlocutory injunction are too well known to be repeated here. Suffice to say that, guided by such rules and exercising the discretion vested in equity courts in such cases, the interlocutory injunction here should have been denied.

One other point in this connection should be mentioned. The complaint prayed injunction against the Commissioner of Agriculture from proceeding under the Bond and License law to revoke or suspend plaintiffs' licenses as citrus fruit dealers or attempting so to do (R. 17). It was contended by plaintiffs that the Commissioner was "without authority whatsoever to revoke the licenses of these plaintiffs or either of them for their failure to comply with the provisions of the Growers' Cost Guarantee Act or the Regula-

tion promulgated thereunder" (R. 16). A copy of the Bond and License law is appended to the bill (R. 20). It is but necessary to call attention of this Court to Section 8 of said Act (R. 27), which provides in part that "whenever the Commissioner determines that any citrus fruit dealer * * * has violated any of the provisions of any other law of the State of Florida governing and applicable to citrus fruit dealers * * * he may * * * suspend the license of such offender for a specific period, or revoke the same * * * and any such order shall specify the effective date thereof" (R. 27). The same section of the Act makes any such order of the Commissioner reviewable by a court of competent jurisdiction (R. 28). The Growers' Cost Guarantee law provides that whenever the cost of production has been fixed as therein provided, every contract with the grower for the purchase, marketing or processing of his fruit shall be held to require the payment to him of such cost price (R. 20). It is also provided that "any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful * * *" (R. 20). It is difficult to perceive upon what basis plaintiffs contended the Commissioner had no right to revoke their licenses upon their refusal to pay the grower 32¢ per box in accordance with the Act and Regulation. It was not only the Commissioner's *right* to do so; it was his *positive duty* under the Bond and License law.

It is respectfully submitted that the interlocutory injunction should not have been granted because: (1) the sole reason assigned by the court for granting the injunction falls if the Act be here adjudged constitutional, and (2) even pretermitting consideration of the constitutional question, plaintiffs made no proper showing under the circumstances of the case for the issuance of such order.

Conclusion

Appellants apologize for the prolixity of this brief, but at the risk of being tedious we have endeavored to present fully our views of the law of the case, both as it pertains to the citrus industry of Florida and also as a matter of judicial precedent. The Act has a distinctly beneficial, and we believe, a constitutional, field of operation. It is submitted that the order and judgment of the District Court appealed from should be reversed.

Respectfully submitted,

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APPENDIX "A"

Growers' Cost Guarantee Law

Chapter No. 16862

Laws of Florida—Acts of 1935

AN ACT relating to citrus fruit: Prescribing conditions nd limitations upon the sale, marketing and processing greements.

WHEREAS, it is found by the Legislature and hereby de- ared that the production and distribution of citrus fruit a paramount industry in Florida upon which the prosper- y of the State in a large measure depends; that such fruit nd the juices thereof have become and are generally used great and rapidly increasing quantities, both voluntarily nd upon advice of physicians, by people of all classes, ages nd conditions; that it is necessary for the reasonable com- ort, welfare, and health of the people and in order to build p their strength and vigor that an adequate and dependa- le supply of high grade citrus fruit be constantly available, nd the production, transportation, processing, distribution nd sale of citrus fruit in the State of Florida is therefore ereby declared to be a business affecting the public health nd interest, that unfair, unjust, destructive, demoralizing, nd uneconomic trade practices have been and continuing be carried on in the sale and distribution of citrus fruit this state to the extent that such fruit has been and is ontinuing to sell in many cases at prices below the cost of roduction and the constant, dependable and adequate sup- ly of such fruit for sale and consumption is thereby so eriously imperiled as to threaten the break down of the in- ustry; that the present acute economic condition in Flor- da is in part the consequence of a severe and increasing dis- arity between the prices of citrus fruit and other commodi- es; that it is both expedient and necessary to build up he quality and reputation of Florida's citrus fruit in the arket and to stabilize the Florida citrus industry and to rotect the public and the growers against fraud, deception, nd financial loss through further continuation of unscru-

pulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

THEREFORE, in the exercise of the police power of the State for the purpose of protecting and promoting the public health and general welfare,

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. This Act shall be known and called the Growers Cost Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1⅗ bushels whether in bulk or in a container.

Section 3. The Commisssioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing cutrus fruit and every contract, agreement, plan or arrangement with the grower by

or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

Section 4. The provisions of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

Section 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

APPENDIX "B"

Resolution & Order

Whereas, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the citrus industry, under authority of Chap-

ter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

Whereas, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

Whereas, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and,

Whereas, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, having proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) cents for the citrus fruit season 1938-39;

Now, Therefore, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D., 1939, and shall be-

come effective at 12:01 a. m. Friday, January 20th, A. D. 1939.

FLORIDA CITRUS COMMISSION,
By JOHN MAXCY,
Chairman.

Attest:
CHAS. F. CHASTAIN,
Secretary.

(Seal.)

APPENDIX "C"

Bond and License Act

Chapter No. 16860, Laws of Florida—Acts of 1935

As Amended by Chapter No. 17777, Acts of 1937

An Act Relating to the purchase, handling, sale and accounting of citrus fruit grown in the State of Florida; to prevent fraud and deception therein; to provide for the licensing and bonding of citrus fruit dealers; to prescribe certain powers and duties of the Commissioner of Agriculture of the State of Florida in the administration and enforcement of this act; and to prescribe penalties for the violations of the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That as used in this Act:

(a) The term "person" means and includes individuals, firms, partnership, association, corporation, and any other business unit.

(b) The term "citrus fruit" means and includes only the fruit Citrus Grandis, Osbeck, commonly called grapefruit, and/or Citrus Sinensis, Osbeck, commonly called Oranges, and/or Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

(c) The term producer means and includes any person engaged in the business of growing and/or producing citrus fruit.

(d) The term "consignor" means and includes any person other than a producer who ships or delivers to any commission merchant, or dealer any citrus fruit for handling, sale or resale.

(e) The term "commission merchant" means and includes any person engaged in the business of receiving any citrus fruit for sale, on commission or for or on behalf of another.

(f) The term "consignment shipper" means and includes any person who contracts with the producer of citrus fruit for the marketing thereof for the sole account and risk of such producer and who agrees to pay such a producer the net proceeds derived from such sale.

(g) The term "cash buyer" means and includes any person who purchases any citrus fruit in Florida from the producer thereof for the purpose of resale.

(h) The term "broker" means and includes any person engaged in the business of negotiating the sale or purchase of any citrus fruit.

(i) The term "agent" means and includes any person, who on behalf of any one citrus fruit dealer, negotiates the consignment or purchase of any citrus fruit.

(j) The term "dealer" means and includes every person other than a producer, consignor, commission merchant, consignment shipper, cash buyer, broker, or agent who in any manner makes or attempts to make money or any other thing of value on any citrus fruit by dealing in the same in any manner whatsoever.

(k) The term "citrus fruit dealer" means and includes every consignor, commission merchant, consignment shipper, cash buyer, broker, agent association, cooperative association, and dealer, as herein above defined.

(l) The term "Commissioner" means the Commissioner of Agriculture of the State of Florida.

(m) The term "standard packed box" means one and three-fifths (1⅗) bushels of citrus fruit whether in bulk or in container.

(n) The term "shipping season" means and includes that period of time commencing July 1 of one year and ending June 30 of the following year.

Section 2. That no person shall act as a citrus fruit dealer without having obtained a license as provided in this Act. That any person desiring to engage in the business of citrus fruit dealer in the State of Florida shall make application to the Commissioner for a license. The Commissioner may by regulation prescribe the information to be contained in such application. Upon the filing of the application, and annually thereafter, the applicant shall pay to the Commissioner a fee of Ten Dollars except that where any applicant expects to deal only as an agent, as defined herein, such applicant shall pay the sum of Five Dollars. All such license fees collected hereunder shall be paid by the Commissioner into the State Treasury monthly to the Credit of the General Inspection Fund. Said fees shall be kept in said General Inspection Fund and are hereby appropriated and made available for defraying the expenses incurred in the administration and enforcement of this Act.

Section 3. That before any license is granted by the Commission to any person other than an agent as defined in this Act, the applicant therefor must deliver to the Commissioner a good and sufficient cash bond or surety bond executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety, in the amount of Ten Dollars for each one thousand standard packed boxes of citrus fruit that the said applicant intends to deal with during the next twelve months, as set forth in his application up to and including one million standard packed boxes of citrus fruit; provided, however, that no bond shall be less than Five Hundred Dollars in amount nor greater than Ten Thousand Dollars in amount. Said bond shall be in the form approved by the Commissioner and shall be conditioned upon compliance with the provisions of this Act, and upon faithful compliance with the conditions of all contracts, verbal or written, made by the citrus fruit dealer with producers relative to the purchase, handling, sale and accounting of sales of citrus fruit and upon applicant accounting for the proceeds of any citrus fruit contracted for in accordance with the terms of the contracts with producers. Said bond shall be to the Commissioner and his successors in office, in favor of every

producer with whom applicant deals in the purchase, handling, sale and accounting of sales of citrus fruit. The aggregate accumulated liability under any such bond shall not exceed the amount named therein. Every such bond shall continue in force and effect until ninety days after the termination of the shipping season for which the bond is given. Any producer claiming to be injured or damaged by any act of said citrus fruit dealer, or the Commissioner on behalf of all producers contracting with the said citrus fruit dealer, may maintain an action on said bond against the citrus fruit dealer and the surety named in said bond, or either of them, and any judgment against the citrus fruit dealer, and/or surety in any such action shall include costs.

In cases where liability under and by virtue of any bond given pursuant to the provisions hereof is admitted, without suit and the amount or amounts admitted to be due are paid to the Commissioner, the Commissioner is authorized and directed to ascertain the amount or amounts due the claimant or claimants who has or have duly filed a claim or claims under and in connection with such bond prior to the expiration of ninety days immediately following the end of the shipping season for which such bond was given, and thereafter the Commissioner shall make distribution of the amount or amounts so paid to him under such bond to the extent that the same may reach in satisfying such claim or claims; provided, however, that where there are two or more claimants who have duly filed claims within the time last aforesaid that aggregate an amount in excess of the amount or amounts held by the Commissioner for distribution, such claimants shall participate in the proceeds of such funds in the hands of the Commissioner only on a pro rata basis, and no one of such claimants shall receive any preference over the others by reason of having filed his claim prior to the filing of the claims of the others.

Section 4. That it shall be unlawful in, or in connection with, any transaction relative to the purchase, sale and accounting of sale and handling of citrus fruit:

1. For any citrus dealer to make or exact any fraudulent charge to and/or from any person.

2. For any citrus dealer to reject or fail to deliver in accordance with terms of the contract without reasonable cause any citrus fruit bought or sold or contracted to be bought or sold by such citrus fruit dealer.

3. For any citrus fruit dealer to discard, dump or destroy without reasonable cause any citrus fruit received by such citrus fruit dealer.

4. For any citrus fruit dealer to make, for a fraudulent purpose any false or misleading statement concerning the condition, quality, quantity, or disposition of or the condition of the market for, any citrus fruit which is received by such citrus fruit dealer or bought or sold or contracted to be bought or sold by such citrus fruit dealer; or the purchase or sale of which is negotiated by such citrus fruit dealer; or to fail or refuse truly and correctly to account promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had.

5. For any citrus fruit dealer to knowingly buy, sell, receive, process or handle stolen citrus fruit.

Section 5. Whenever an applicant has paid the prescribed fee, the Commissioner shall issue to such applicant a license which shall entitle the licensee to do business as a citrus fruit dealer unless and until it is suspended or revoked by the Commissioner in accordance with the provisions of this Act but said license shall automatically terminate unless the annual fee is paid within thirty days after notice has been mailed that payment is due.

Section 6. That if any citrus fruit dealer violates any provisions of this Act he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation. Such liability may be enforced either (1) by complaint to the Commissioner, as hereinafter provided, or (2) by suit in any Court of competent jurisdiction; but this Section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

Section 7. That any person complaining of any violation of any of the provisions of this Act by any cirtus fruit

dealer during any shipping season may at any time prior to the expiration of ninety days immediately following the end of such shipping season apply to the Commissioner by petition, which shall briefly state the facts, whereupon, if in the opinion of the Commissioner the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commissioner to the citrus fruit dealer, who shall be called upon to satisfy the complaint or to answer it in writing within a reasonable time to be prescribed by the Commissioner. After an opportunity for hearing on a complaint the Commissioner shall determine whether or not the citrus fruit dealer has violated any of the provisions of the Act. If after hearing on a complaint made by any person under this Section the Commissioner determines that the citrus dealer has violated any provision of this Act, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If any citrus fruit dealer does not comply with an order for the payment of money within the time limited in such order, the complainant or any person for whose benefit such order was made, may, within ninety days from the date of the order file in any Court of competent jurisdiction a petition or declaration setting forth briefly the causes for which he claims damages and the order of the Commissioner in the premises. Such suit in such Court shall proceed in all respects like other civil suits for damages, except that the findings and order of the Commissioner shall be prima facie evidence of the facts therein stated, and the petitioner or plaintiff shall not be liable for costs in such Court nor for costs in any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner or plaintiff finally prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

Section 8. That whenever the Commissioner determines that any citrus fruit dealer violated any of the provisions of this Act or has violated any of the provisions of any other

law of the State of Florida governing and applicable to citrus fruit dealers as herein defined, he may publish the facts and circumstances of such violation and/or by order, suspend the license of such offender for a specific period, or revoke the same or make such other appropriate order as he may deem just and proper, and any such order shall specify the effective date thereof and any order other than one suspending or revoking a license shall automatically suspend such license until said order is complied with. That any action of the Commissioner with reference to the revocation or suspension of any license granted under the provisions of this Act, may be reviewed by any Court of competent jurisdiction.

Section 9. That every citrus dealer shall make and keep a correct record showing in detail the following with reference to the purchase, handling, sale and accounting of sale of citrus fruit handled by him, namely:

(a) The name and address of the producers or other persons from whom the citrus fruit was produced, and if same was procured from some other than a licensed handler, the name and address of the producer of said fruit.

(b) The date citrus fruit is received and the amount thereof, and the purchase price paid therefor if purchased for the purpose of resale.

(c) The condition of such citrus fruit upon receipt by the citrus fruit dealer.

(d) If the citrus fruit is handled on consignment for the account of the producer, the date of sale and the selling price.

(e) An itemized statement of the charges to be paid by the producer in connection with any sale.

(f) A detailed statement of all claims made by producers against the citrus fruit dealer, a copy of each when received to be certified to and filed with the Commissioner.

(g) A copy of the record and account of sales of citrus fruit handled on consignment and/or commission shall be delivered to the producer upon the consummation of the sale, together with all moneys received by the citrus fruit dealer in payment for such transaction made upon account of the

producer, less the agreed commission and other charges which must be separately itemized, and payment and accounting must be made by said citrus fruit dealer to the producer within fifteen days after said citrus fruit dealer received the money in payment of said citrus fruit unless otherwise specified in contract between citrus fruit dealers and producer.

Section 10. That in the investigation of complaints under this Act the Commissioner, or his duly authorized agents, shall have the right to inspect such accounts, records, and memoranda of any citrus fruit dealer as may be required for the determination of any such complaint. If any such citrus fruit dealer refuses to permit such inspection, the Commissioner may publish the facts and circumstances and/or by order suspend the license of the offender until permission to make such inspection is given.

Section 11. That the Commissioner, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records and memoranda as may be material for the determination of any complaint under this Act. In case of disobedience to a subpoena of the Commissioner, or any of his officers or employees, may invoke the aid of any Court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of accounts, records and memoranda and any such Court may in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Commissioner, or his agents or employee or to produce accounts, records, and memoranda as so ordered, or to give evidence touching any matter pertinent to any complaint and any failure to obey such order of the Court shall be punished by the Court as a contempt thereof.

Section 12. That the commissioner may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the United States Government.

Section 13. That any person who acts as a citrus fruit dealer as defined in this Act without a license, or having a license, violates or aids in the violations of any provision of this Act, or any person who represents himself as a citrus fruit dealer but who is not a citrus fruit dealer as defined in this Act, shall for each and every offense be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding $1000.00 or by imprisonment in the county jail for more than six months or by both such fine and imprisonment in the discretion of the Court. Civil suits and criminal prosecutions arising by virtue of any of the provisions of this Act may be instituted in the County where the said citrus fruit was received by the citrus fruit dealer, or in the County in which the principal place of business of such citrus fruit dealer is located within the State of Florida, or within the County in which the violation of this Act occurred, or if such violation occurs in more than one county, then within any county in which such violation of this Act occurred.

Section 14. That the several Circuit Courts of the State of Florida, sitting in Chancery, are hereby vested with jurisdiction specifically to enforce and to enjoin and restrain any citrus fruit dealer from violating, the provisions of this Act, or of any rule, regulation or order made by the Commissioner pursuant to this Act in any proceeding brought by the Commissioner in any of said Circuit Courts; and in any such proceeding it shall not be necessary for the Commissioner to allege or prove that an adequate remedy at law does not exist.

Section 15. That it shall be the duty of each state and/or county law enforcement officer to make arrests for violation of this Act when notified of such violation by the Commissioner of Agriculture, or his authorized agent, inspector or representative.

Section 16. That this act shall be liberally construed and if any part or portion thereof be declared invalid, or the application thereof to any person, circumstance or thing is declared invalid, the validity of the remainder of this Act and/or the application thereof to any other person,

circumstance or thing shall not be affected thereby and it is the intention of the Legislature to preserve any and all parts of said Act if possible.

Section 17. That all laws or parts of laws in conflict herewith and the same are hereby repealed.

Section 18. That this Act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

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